Supreme Court of the United States

OCTOBER TERM, 1962

No. 903

UNITED STATES, PETITIONER

vs.

KENNETH LEROY BEHRENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

[fol. 1]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

CRIMINAL DOCKET

TH-60-CR-26

Title of Case

THE UNITED STATES

vs

KENNETH LEROY BEHRENS

Attorneys

For U. S.:

United States Attorney

For Defendant:

Vio: Assault with intent to murder, and Assault of Govt. Employee Title 18 U.S.C. Sec. 113(a) & 111—2 Counts Symbol

WILLIAM E. STECKLER, JUDGE

* * * *

[fol. 2]

* * * *

DATE	DOCKET ENTRIES
8/12/60	Indictment filed. Bail $10,000. Praecipe for warrant filed.

* * * *

DATE	DOCKET ENTRIES
[fol. 3]	
	• • • •
12/19/60	Trial commenced. Jury impaneled and sworn. Out of the presence of jury, deft orally moves the Court for a mental examination. After hearing from counsel of both parties, court overrules said motion. Opening statement of counsel for govt made, deft. waiving making an open statement. Evidence on behalf of the govt is heard and concluded and govt rests. Evidence on behalf of the deft is heard and concluded, and deft. rests. Court adj. until 10:00 tomorrow morning. (SE)
12/20/60	Trial resumed. Out of presence of jury, the Court inquires of deft if he wishes to take the witness stand in his own behalf, and deft answers the Court in the affirmative. Closing arguments of counsel are heard, after which the court instructs the jury, Deputy marshal, in whose charge the jury will be, is now sworn. Jury is instructed to commence its deliberations. Jury returns verdict in open court finding deft guilty on Ct. I and not guilty on Ct. II of the indictment. Jury discharged. (SE)
	Deft. sentenced to 20 years in prison and for a study to be furnished by the court within 3 months under Title 18 USC 4208 (c) whereupon the sentence of imprisonment shall be subject to modification in accordance with Title 18 USC 4208(b).
	• • • •
1/20/61	Upon request of James V. Bennett, Dir. of Prisons, Dept. of Justice, dated 1/17/61, to extend period of observation for defendant an additional 30 days is GRANTED. Period of observation on defendant extended an additional 30 days. (SE)

DATE	DOCKET ENTRIES
1/17/61	Defendant files motion for transmittal of record in forma pauperis.
2/ 1/61	Court denies motion for transmittal of record in forma pauperis.
2/10/61	Request of Mr. James V. Bennett, Dir. of Bureau of Prisons, dated 2/8/61, for an extension of period of observation for deft., GRANTED Period of observation extended an additional 60 days. (SE)
6/13/61	Court enters order modifying judgment. Deft. Behrens sentence of imprisonment heretofore imposed be reduced to 5 years, and deft shall become eligible for parole under the provisions of Title 18 U.S.C. 4208 (a) 2. (SE)

[fol. 4]

* * * *

4/11/62	Defendant files motion to vacate sentence.
4/11/62	Motion to vacate sentence denied.
4/23/62	Affidavit of poverty filed and request to appeal in forma pauperis
4/25/62	Leave to appeal in forma pauperis granted. Notice of Appeal under Rule 71(b) filed.

[fol. 5]

WILLIAM E. STECKLER, Judge

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH-60-Cr-26
18 U.S.C., 113(a)

[File Endorsement Omitted]

UNITED STATES OF AMERICA

v.

KENNETH LEROY BEHRENS

INDICTMENT—filed August 12, 1960

COUNT I

The Grand Jury charges:

That on or about August 7, 1960 Kenneth Leroy Behrens, at and in Vigo County, State of Indiana, in the Terre Haute Division of the Southern District of Indiana, on lands reserved and acquired for the use of the United States as a site for a penal institution and within and under the exclusive territorial jurisdiction of the United States, did unlawfully, wilfully and with malice aforethought assault Donald Byron Skaggs, a human being, with the intent to murder the said Donald Byron Skaggs, by stabbing said Donald Byron Skaggs with a metal knife.

COUNT II 18 U.S.C., 111

The Grand Jury further charges:

That on or about August 7, 1960 Kenneth Leroy Behrens at and in Vigo County, State of Indiana, in the Terre Haute Division of the Southern District of Indiana did unlawfully and wilfully, and with the use of a dangerous weapon, to-wit: a metal knife, forcibly as-

sault Floyd Dunnagan who was then and there engaged in the performance of his official duties as an employee of the United States Prison, Terre Haute, Indiana.

A True Bill

/s/ R. E. Jones
Foreman

/s/ Don A. Dabbert
United States Attorney

[fols. 6-8] * * *

[fol. 9]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH-60-CR-26

UNITED STATES OF AMERICA

vs.

KENNETH LEROY BEHRENS

ENTRY OF ARRAIGNMENT AND APPOINTMENT OF COUNSEL
September 7, 1960

Honorable William E. Steckler, Judge

Comes now the attorney for the Government and the defendant appears in person and being without counsel the Court advises the defendant that he has the right to have an attorney, and if he is financially unable to hire one, the Court will appoint counsel to represent him without charge, and the defendant indicating that he wants an attorney, the Court appointed Ralph A. LaFuze, a member of the bar of this Court to represent him. After conferring with counsel, the Court explains to the defendant the nature of the charge and the rights afforded him under the Constitution and after being fully advised, the defendant executes and files Consent to Transfer of Case within District, which reads as follows, to-wit: (H.I.) The defendant having been given a copy of the Indictment and the same having been read to him in open Court by the attorney for the Government, now states that he thoroughly understands the nature of the charge against him, and being arraigned upon the Indictment, for plea, says that he is Not Guilty as charged.

[fols. 10-15] • • •

[fol. 16]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-CR-26

UNITED STATES OF AMERICA

v.

KENNETH LEROY BEHRENS

VERDICT—December 20, 1960

We, the Jury, find the defendant Guilty on Count I and Not Guilty on Count II of the indictment.

/s/ E. E. Christeria
(Foreman)

(Date) December 20, 1960

[fol. 17] • • •

[fol. 17a]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-Cr-28

UNITED STATES OF AMERICA

v.

KENNETH LEROY BEHRENS

TRANSCRIPT OF THE DISPOSITION OF DEFENDANT BEHRENS, BEFORE HON. WILLIAM E. STECKLER ON THE 20TH DAY OF DECEMBER, 1960

APPEARANCES:

FOR THE GOVERNMENT—James W. Bradford and John C. Vandivier, Jr., Assistant U. S. Attorneys.

FOR THE DEFENDANT—Ralph Lafuze, of Lafuze, Ging & Graber, Indianapolis, Indiana.

[fol. 17b] (At 2:05 P.M., after the Jury had returned its verdict of "Guilty" on one Count and been excused, the Court, along with Mr. Bradford and Mr. Lafuze, with the Defendant, remained in session as the following transpired:)

THE COURT: I will hear from counsel with regard to this stage of the proceedings; that is, whether or not there is good reason for the Court to refer the matter to the Probation Office for a pre-sentence investigation, or whether the Court should withhold the imposition of final sentence, impose the maximum today, and order a study to be made by the Bureau of Prisons as to the recommendations that they might have to make. Or whether the Court should go ahead and impose final judgment today

in view of the known prior record of the Defendant and in view of the Court's first-hand knowledge of the evidence of the case. The evidence that the Jury heard. It's all fresh in the mind of the Court.

I'll hear from the Government counsel. What do you think, Mr. Bradford?

MR. BRADFORD: Your Honor, the Government at this time would see no benefit from a pre-sentence investi- [fol. 17c] gation. And it is the desire of the Government to dispose of the case today if possible, leaving it in the Court's sound discretion as to whether the Court would care to impose a sentence of the Court's own choosing, or whether the Court would prefer to impose a sentence under 18 United States Code 4208, that being the maximum with the Bureau of Prisons being permitted to make a study. The Government would not oppose either method of disposition by the Court.

THE COURT: All right. Mr. Lafuze, what is your attitude with regard to the matter of making a disposition of the case on the various—under the various methods that I have stated?

MR. LAFUZE: I have consulted with the Defendant, and we feel that we would like to have the case disposed of today.

THE COURT: Today?

MR. LAFUZE: Yes.

THE COURT: Does he have a desire to have it disposed of today?

THE DEFENDANT: Yes, your Honor.

THE COURT: You mean you want this Court to en- [fol. 17d] ter its final judgment today, is that right?

THE DEFENDANT: (Nods head.)

THE COURT: Now you're not interested in this Court having a further pre-sentence investigation made—

THE DEFENDANT: (Shakes head)

THE COURT: —nor having a special study made by the Bureau of Prisons?

THE DEFENDANT: (Shakes head.)

THE COURT: Are you acquainted with that procedure?

THE DEFENDANT: (Shakes head.)

THE COURT: You are not. Well, it works both ways. Sometimes it works for a defendant, and sometimes it works against him.

But I'm inclined to follow the 2208 (sic) procedure in this case. I say that for this reason: This presents an internal problem to the prison system of what to do with these fellows who are bent upon violating the rules of decency, and you might say just ordinary civility, in the prison community. They don't even act civilized at times in these penal institutions.

[fol. 17e] I don't know, Mr. Behrens, whether or not you heard about Mr. Stalls down there or not, did you?

THE DEFENDANT: (Nods head.)

THE COURT: Were you in the dining room when he was involved in that affair?

THE DEFENDANT: (Shakes head.)

THE COURT: But you heard that he, too, was involved in an affair in which a knife had been taken from the dining room and sharpened into a very effective dangerous instrument.

Hadn't you heard that?

THE DEFENDANT: (Nods head.)

THE COURT: Could that by chance have caused you to come up with the same idea?

THE DEFENDANT: (Shakes head.)

THE COURT: How well-known is it down there—Or how well is it generally known that you can take these knives out of the dining room and sharpen them up and make a deadly weapon out of them? Does everybody know that?

THE DEFENDANT: It's general knowledge.

[fol. 17f] THE COURT: Very generally known, is it?

THE DEFENDANT: Anybody can carry a knife.

THE COURT: Well, this Court has somewhat of a mixed feeling about these prison cases. I can see two sides to this problem. I can see the civil court's side, our side. I can see the side of the penal authorities. Here on the one hand they're required to use complete restraint with regard to their own conduct as to these obstreperous individuals who don't want to follow the rules of the institution.

On the other hand, I presume I am somewhat laboring in the dim past, where prison officials had the right—or they didn't have the right; they took, within their own means, the so-called "rubber hose," or the "whipping post." And they handled their own internal problems themselves. And no Court heard anything about them.

Now about five years ago this Court commenced receiving out of the Terre Haute Penitentiary these cases. What went on before that, I don't know. But we didn't [fol. 17g] have very many, if any. But above five years ago we started getting these cases out of the Penitentiary.

Now this past year we had one defendant who was charged with first-degree murder. And it wasn't over six months before that when the Court gave a defendant the maximum, as provided by law, for assault with a deadly weapon. So as to establish a deterrence down in that institution.

And what happened? Our friend Knight comes along and murders one of his fellow inmates, I dare say within less than six months after that. And Knight was there when the other individual received the ten year sentence for assault and battery.

I don't think we're going to deter these boys down in the penal institution from cutting each other to pieces. I think the most important thing that I recognize out of these experiences involving the prisoners is that double precautions must be taken to prevent access to deadly weapons.

There's just too much of it. These fellows are slicing each other to pieces down there, and apparently the penal [fol. 17h] authorities are almost helpless.

It's a little alarming to a judge to hear about narcotics in an institution. Enough could be gleaned out of this record in this case to indicate that some of these boys had access to something that they shouldn't have had.

Now am I right in that?

THE DEFENDANT: (Shakes head.)

THE COURT: You're not talking, are you?

THE DEFENDANT: (Nods head.)

THE COURT: You don't know?

THE DEFENDANT: (Shakes head.)

THE COURT: But you don't know anything about the narcotics?

THE DEFENDANT: (Shakes head.)

THE COURT: Well, the way I feel about it—The only reason that this dissertation came forth is I think we've got here somewhat of an internal problem with which the penal authorities are confronted. And I see no reason why they should not make a study in these cases and come up with a recommendation as to what they [fol. 17i] think is an appropriate disposition of the case. And I don't say that I will follow their recommendations to a letter But there'll have to be a rather strong showing made as to why the Court would not follow what I consider to be a reasonable recommendation on the part of the Bureau of Prisons, under these 4208 proceedings.

So you see where it puts you, Mr. Behrens: You're right back in the control of the prison authorities. You better make up your mind to behave yourself. And try to salvage what you can out of your life.

And I might say, from my own observation, I believe that you are a young man who hasn't tried to see the better side of life. I don't think you've tried at all. I think you've seen the dim, dark, shady side of life. As long as you stay on that side you see only the immorality that exists all about you. I don't think there's very much hope for you in that event.

I know a whole lot more about you than what I've already told you. I think you'd better start straightening [fol. 17j] out your ways. You're going to destroy yourself from within.

This letter here is what I had reference to. This letter from Dr. Rink tells a lot of story. Tells an awful lot.

Do we have that—

(The Court confers outside the record briefly with his Court Crier.)

THE COURT: No, I have it.

Well, since it is the desire of the Defendant to have this case disposed of today, I will dispose of it today. But it will be under the flexible provisions of 4208—Section 4208.

All right, Mr. Behrens, would you step up here? I may want to hear from you further.

(The Defendant, accompanied by his counsel, come forward.)

THE COURT: Under the law the Court must give you an opportunity to say anything you have to say as to why the Court should not impose an executed judgment, or an "executed sentence,"—

THE DEFENDANT: No.

THE COURT: Don't you have anything to say?

[fol. 17k] THE DEFENDANT: (Shakes head.)

THE COURT: Don't you have any remorse, any feeling at all with—

THE DEFENDANT: My remarks ain't fit in your ears.

THE COURT: None whatsoever?

THE DEFENDANT: (Shakes head.)

THE COURT: Have you given up entirely?

THE DEFENDANT: It's just simpler to get it over with.

THE COURT: I certainly would want to know about your history. I want to know more about you before I enter a final judgement in your case. I think we ought to try to find out, Mr. Behrens, where you got off. You're off the track somewhere. 'Way off. I don't believe that every man is as bad on the inside as you may want to make yourself believe you are. It's too much against nature for a man really to be as you seem to purport to the doctor, Dr. Rink, that you are. I think you're fooling yourself now. I don't think you really believe in what you state you stand for.

[fol. 17l] What is the penalty?

He has nothing to say.

I'll hear from you, too, Mr. Lafuze. What do you have to say, Mr. Lafuze, as to why the Court should not impose a final judgement today, or impose an executed sentence?

MR. LAFUZE: Well, it's—I really haven't had much experience in this aspect of life. Haven't had much experience in criminal law, what goes on in the peniten-

tiary. But from what Behrens tells me, he's—he's very mistrustful. He thinks the world is against him. And I—I don't know what—how we could help him. I've tried to talk with him. I've had a tough—I've had a difficult time talking to him. I don't know whether anybody could really talk to him. He just doesn't trust anybody. Until he does, I don't see how we can help him.

If he would—perhaps if he would trust a psychiatrist he might be helped. I imagine there are—the Government has psychiatrists who are competent. Might be able to do something for him.

But he's—

THE COURT: One thing sure, I agree with you. He [fol. 17m] needs help. He needs something to straighten his thinking around.

Well, let's see now, they found the Defendant Not Guilty on—

MR. BRADFORD: Count II, which is—

THE COURT: What is the penalty on Count I?

MR. BRADFORD: Up to 20 years, your Honor.

THE COURT: Up to 20 years. What was the—That was 113—

MR. BRADFORD: 113(a), your Honor.

THE COURT: (Examines documents) All right. Do you have anything to state further, Mr. Bradford?

MR. BRADFORD: No, your Honor. The evidence all went in yesterday. I'm certain the Court has a true and accurate picture of what took place. There are no matters in aggravation which the Government would offer at this time, sir.

We have nothing further to state.

THE COURT: All right. Except for the fact that [fol. 17n] I—I'm convinced that maximum sentences in these cases do not deter these fellow prisoners, I would be inclined to impose a very substantial sentence in this case today. Because I don't want to try murder cases. Now that's the reason I imposed the maximum sentence once before, hoping that we could avoid trying first-degree murder cases. And it was less than six months after we imposed that maximum penalty as a deterrent that we were confronted with a murder that had been committed in the very institution.

MR. BRADFORD: I think, your Honor, that maximum sentencing has some deterrent value. However, it is not the whole answer.

But one thing that concerns the Government—now we have an offense, stabbing in an institution. What occurs to me, after presenting several of these cases to Grand Juries, having tried this case and the Stalls case, what concerns me would be Mr. Stalls or Mr. Behrens on the street. That's the thing that concerns me. It's not primarily the deterrent of the other inmate population.

THE COURT: I see what you mean. I think you're [fol. 17o] right.

MR. LAFUZE: Your Honor, if I could just say something: In the case I think it was brought out that the prison authorities are really rather helpless to deal with these prisoners. I mean, what can they do? You say "Take away their dessert and throw them in solitary." It's much different than it used to be, apparently. And I remember my experience in the Military Service, in the U. S. Navy, was somewhat the same. The power of the Captain to punish had just been reduced until he has to resort to courts; and discipline, I think, has suffered.

And perhaps it's the same true in prisons. (sic) Lack of power to discipline at local levels have brought the cases up to the Federal Court.

THE COURT: Well, there is no way of judging with any certainty what degree of deterrence is accomplished by imposing maximum penalties with regard to specified crimes. I mean, there's just no way of telling.

Well, it is the Judgement of this Court, based upon the [fol. 17p] Jury's finding of Guilty with regard to Count I of the indictment, that the Defendant is guilty as charged therein; and that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of twenty years, and for a study as described in Title 18, United States Code, Section 4208(c), the results of such study to be furnished this Court within ninety days, or three months —Three months. Make it "three months" instead of the "ninety days." It's more uniform. Within three months. Whereupon the sentence of imprisonment herein imposed

shall be subject to modification in accordance with Title 18, United States Code, Section 4208(b).

Now in short, Mr. Behrens, what this means is that after there has been a staff evaluation made of your case —and I presume that you're pretty sick about hearing— or sick of hearing about "staffs" and "staff evaluations" and "psychiatric evaluations," but they have a purpose and they have a place. And we believe in them. Now there will be such an evaluation made in your case.

And I think after about three months, when everybody [fol. 17q] has had an opportunity to reflect upon your case quite thoroughly, that we should be able to come up with a sane and civil disposition of your case.

So, I will rely I presume largely upon what the Bureau of Prisons recommends.

I go back to my original thought: This is a case that lies largely within their own realm. They ought to be able to have a lot of say-so as to what should be done with this case in the final analysis. Because he's offended the prison system.

All right. We'll stand adjourned.

(Whereupon, at 2:30 o'clock P.M., December 20, 1960, these proceedings were concluded.)

[fol. 17r]

[Reporter's Certificate to foregoing transcript omitted in printing]

[fol. 18]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-CR-26

UNITED STATES OF AMERICA

vs.

KENNETH LEROY BEHRENS

JUDGMENT AND COMMITMENT—December 20, 1960

On this 20th day of December, 1960 came the attorney for the Government and the defendant appeared in person and by Ralph C. LaFuse, his court-appointed attorney. No presentence investigation having been directed by the Court,

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of, on or about August 7, 1960, at and in Vigo County, State of Indiana, on lands reserved and acquired for the use of the United States as a site for a penal institution and within and under the exclusive territorial jurisdiction of the United States, did unlawfully, wilfully and with malice aforethought assault Donald Byron Skaggs, a human being, with the intent to murder the said Donald Byron Skaggs, by stabbing him with a metal knife, in violation of Title 18 U.S.C. Section 113(a), as charged in Count I of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his au-

thorized representative for imprisonment for a period of Twenty (20) years, and for a study as described in Title 18 U.S.C. 4208(c), the results of such study to be furnished the Court within Three (3) months, whereupon the sentence of imprisonment shall be subject to modification in accordance with Title 18 U.S.C. 4208(b).

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer, and that the copy serve as the commitment of the defendant.

/s/ William E. Steckler
United States District Judge

[fol. 19]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS, INDIANA

No. TH-60-CR-26

[File Endorsement Omitted]

KENNETH L. BEHRENS, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENTS

MOTION FOR TRANSMITTAL OF RECORD IN FORMA PAUPERIS—filed January 17, 1961

TO: The Honorable William E. Steckler, Judge.

May it please the court that now comes Kenneth L. Behrens, Petitioner in propria persona in this entitled course of action; and asking for cause why an order granting the preparation and transmittal of record in forma pauperis in petitioner's behalf, should not be granted.

Jurisdiction

For jurisdiction in this matter, petitioner cites the provision's of section 1915; title 28; U.S.C. Re., that your petitioner is a citizen of the United States by virtue of birth with out sufficient fund's to prepay the cost of this action, or it's preparation thereto; that he submits this motion in good faith in the expectations of further proceedings; and that his said motion is not submitted herein as a form of exactions litigation.

For jurisdiction for the possible allowance of the order to forthwith issue (as discretionary); the petitioner cites the recent decision of the United States Supreme Court in the case of Griffin vs. People of the State of Illinois, 76 S. Ct. 858; (prisoner's court transcript in forma [fol. 20] pauperis.) ???ided April 23, 1956.

Defacto Evidence

Petitioner refers to this honorable court to all proceedings had prior to and including the 20th day of December, 1960; where upon sentence was imposed.

Conclusion

Petitioner respectfully submits that in support of the foregoing jurisdiction and authority, that the relief as prayed be granted.

Payer

The premises fully considered, your petitioner pray's that an order be granted, and entered under the hand and seal of this court; directing the clerk of said court to prepare the following document's as part of the proceeding's had in criminal case number *26*, and that the same be transmitted to your petitioner without cost thereof.

(1) TRANSCRIPT OF TRIAL, No. TH-60-CR-26.
(2) ALL WARRANTS ISSUED.

Respectfully Submitted

/s/ Kenneth L. Behrens
KENNETH L. BEHRENS,
Petitioner

Personally appeared before me, the above named man Kenneth L. Behrens known to me to be the same person who executed the forgoing instrument, and acknowledged to me that he had executed the same as his free act and deed.

Witness my signature and official designation

/s/ C. H. Shade
C. H. SHADE—Attesting Officer
Case Worker, U.S. Penitentiary
Terre Haute, Indiana

Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)

Dated at Terre Haute, Indiana, this 12 day of Jan. 1961.

[fols. 21-22] * * *

[fol. 23]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-CR-26

UNITED STATES OF AMERICA

vs.

KENNETH LEROY BEHRENS

ORDER DENYING MOTION FOR TRANSMITTAL OF RECORD IN FORMA PAUPERIS—February 1, 1961

This cause came before the court upon the "Motion for Transmittal of Record in Forma Pauperis" filed by the defendant herein. Defendant, under this cause number, designates himself in the motion as "Petitioner," and designates the United States of America as "Respondents." The motion was filed January 17, 1961.

After reciting that he is a citizen of the United States and without sufficient funds with which to pre-pay the costs of this action or for its preparation for further proceedings, defendant asks that the Clerk of the Court be ordered to prepare and transmit to the petitioner without cost, (1) "Transcript of Trial, No. TH 60-CR-26, and (2) "All Warrants Issued."

A judgment of commitment was entered in this cause on December 20, 1960, the defendant having been found guilty by jury of the offense of having willfully and with malice aforethought assaulted Donald Byron Skaggs, with intent to murder the said Donald Byron Skaggs, by stabbing him with a metal knife on lands reserved and acquired for use of the United States as a site for a penal institution, in violation of Title 18 U.S.C. § 113(a). The defendant, on said 20th day of December, 1960, was [fol. 24] committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 20 years and for a study described in Title 18 U.S.C. § 4208(c), the results of such study to be furnished the court within three months, whereupon the sentence of imprisonment shall be subject to modification in accordance with Title 18 U.S.C. § 4208(b).

Thus, according to Rule 37 (a) (2) Federal Rules of Criminal Procedure, the time for appeal from the entry of the judgment of December 20, 1960, expired on December 30, 1960. Defendant's "Motion for Transmittal of Record in Forma Pauperis" which was filed on January 17, 1961, was filed after the time for appeal had expired, and accordingly, there is no judicial proceedings pending before this court in this cause of action with respect to which this court may order payment of the costs of a transcript under 28 U.S.C. § 1915, and the Court Reporter Act, 28 U.S.C. § 753.

Lest it should be asserted that the time for appeal runs from the date of the modification of the original judgment in this cause, attention is called to the provisions of Title 18 U.S.C. § 4208(a) which speaks initially of "judgment of conviction," and § 4208(b) which refers to "determining the sentence to be imposed" and provides that "the term of the sentence shall run from the date of the original commitment under this section." It is thus indicated that this section is concerned with punishment and [fol. 25] not with that part of the judgment which pronounces conviction; or, stated in other words, that part of the court's judgment of December 20, 1960 providing for the study and the report and making the sentence of imprisonment of 20 years subject to modification upon the receipt of the report of such study, does not stay the running of the time within which appeal must be taken, i.e., ten (10) days as provided by Rule 37, Federal Rules of Criminal Procedure. If any appeal was to have been taken, it had to be taken within ten (10) days of the judgment of conviction. An analagous case is one wherein the imposition of sentence is suspended and the defendant is placed on probation. The appeal nevertheless runs from the date of such judgment. *Korematsu* v. *United States*, 319 U.S. 432.

Since the court concludes there is now no proceedings pending before the court, the motion for the furnishing of the transcript and the warrants without costs as prayed by the defendant is hereby DENIED.

/s/ William E. Steckler
United States District Judge

[fol. 26-27] * * *

[fol. 28]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-CR-26

UNITED STATES OF AMERICA

vs.

KENNETH LEROY BEHRENS

ORDER MODIFYING JUDGMENT—June 13, 1961

The defendant having been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of, on or about August 7, 1960, at and in Vigo County, State of Indiana, on lands reserved and acquired for the use of the United States as a site for a penal institution and within and under the exclusive territorial jurisdiction of the United States, did unlawfully, wilfully and with malice aforethought assault Donald Byron Skaggs, a human being, with the intent to murder the said Donald Byron Skaggs, by stabbing him with a metal knife, in violation of Title 18 U.S.C. Section 113(a) as charged in Count I of the Indictment, and having on December 20, 1960 been committed to the custody of the Attorney General pursuant to Title 18 U.S.C. 4208(b), for imprisonment for a period of Twenty (20) years, and for a study as described in 18 U.S.C. 4208(c), and the Court having now received and considered the report of such study,

IT IS ORDERED AND ADJUDGED that the period of imprisonment heretofore imposed be reduced to Five (5) years, and that the defendant shall become eligible for parole at such time as the Board of Parole may determine under the provisions of Title 18 U.S.C. 4208(a)(2).

DATED: June 13, 1961.

/s/ William E. Steckler
United States District Judge

[fols. 29-33] * * *

[fol. 34]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS, INDIANA

Case No. TH 60-CR-26

KENNETH L. BEHRENS, PETITIONER

vs.

UNITED STATES OF AMERICA

[File Endorsement Omitted]

MOTION TO VACATE SENTENCE UNDER SECTION 2255; TITLE 28; U.S.C. IN FORMA PAUPERIS UNDER SECTION 1915; TITLE 28; U.S.C.—filed April 11, 1962

Comes now the petitioner, Kenneth L. Behrens, who respectfully submits to this Court the following facts and allegations why his sentence should be vacated.

Statements of Facts

1 On September 7, 1960, the petitioner appeared before the United States District Court in Indianapolis, Indiana for arraignment; charged with violation of Sections 113 (A), III, Title 18, U.S.C. The petitioner entered a plea of not guilty on each of the charges.

(2) On September 7, 1960, the court appointed a Mr. Ralph O. Lafuze, attorney at law, to represent the petitioner.

(3) The Honorable William E. Steckler presided at the petitioner's arraignment and trial.

(4) On December 19, 1960, the petitioner was tried in the United States District Court in Indianapolis, Indiana; charged with violation of Sections 113 (A), III, Title 18; U.S.C. A prefatory request for a mental examination of the petitioner was denied by the court.

(5). At the pronouncement of sentence, Judge William E. Steckler, cross-examined the petitioner on matters not pertinent to the charges for which the petitioner was to be sentenced.

[fol. 35] Allegations

* * * *

(6) That two agents of the Federal Bureau of Investigation, serving as witnesses for the prosecution, under sworn oath, did make the following mendacious statements:

(A) Federal Bureau of Investigation Agent Manning falsely testified that he and Agent Gettle, interviewed the petitioner on the evening of August 7, 1960 in a room of which he, Agent Manning, and the petitioner were the sole occupants in the room at the Federal Penitentiary at Terre Haute, Indiana. Warden T. W. Markley, Associate Warden H. J. Davis, and other officials of the Federal Bureau of Prisons were also present during the course of the aforesaid interview.

(B) Agent Manning falsely testified that the petitioner was advised of his constitutional right to legal counsel.

(C) Agent Manning falsely testified that the petitioner was not exposed to intimidation. Agent Manning promised to intercede in the petitioner's behalf to persuade Warden Markley to have him transferred from the strip-cell in which he had been quartered since August 7, 1960, to persuade Dr. Rinck, chief medical officer of the aforesaid institution, to insure the petitioner necessary medication—which had been discontinued since August 7, 1960, on the condition that he sign an incriminating statement.

(7) That officers of the Federal Bureau of Prisons, serving as witnesses for the prosecution, under sworn oath, did make the following contradictory statements:

(A) Officer Floyd Dunnagan testified that Officer Norrick attempted to physically apprehend the petitioner as he descended from the right hand stair case in "L" unit. [fol. 36] Officer Dunnagan's testimony was saliently contradicted by Officer Norrick who testified that he held a

butt can in his hands and that he did not attempt to physically apprehend the petitioner.

(B) Officer Kenneth Norrick testified that the petitioner ran down the right hand stair case of "L" unit directly and without interruption into the corridor.

Officer Norrick's testimony was saliently contradicted by Officer Conway who testified that the petitioner was standing in the doorway of "L" unit after which he ran into the corridor.

(C) Officer David Boyce testified that upon his request the petitioner placidly surrendered a knife to him, and the following conversation ensued (in a normal tone of voice):

Officer Boyce: "Did you get him?"

Petitioner: "I hope I killed him."

Officer Lawrence Conway testified that the corridor was sufficiently quiet to permit him to be witness to the foregoing conversation.

Officer Conway's testimony was saliently contradicted by Officer Norrick who testified that the scene of the petitioner's apprehension was tumultuous with all of the officers in the vicinity shouting to the petitioner.

(D) Officer Floyd Dunnagan testified that the petitioner made the following statements to Donald B. Skaggs who was in a prostrate position: "Get up or I will stab you again".

Officer Dunnagan's testimony was saliently contradicted by Federal Prisoner Carl Dunn who, as a witness for the prosecution testified that the petitioner made the following statement to Donald B. Skaggs: "Get up so I can stab you some more."

(E) Officer Floyd Dunnagan testified that Skaggs sprinted up the left stair case in "L" unit pursued by the petitioner, and that Skaggs had blood on the back of his shirt and not on the front of his clothing.

Officer Dunnagan's testimony was saliently contradicted by Federal Prisoner Carl Dunn who, as a witness for the prosecution, testified that Skaggs had blood on the front of his shirt. The victim Donald B. Skaggs testified that he felt a blow on his back and while running up the stairs he felt his back bleeding.

(8) That the petitioner has incontestable proof that one of the witnesses, furnished by the prosecution, perjured himself at the aforesaid trial.

Wherefore, the petitioner respectfully prays that a vacation of sentence be granted; and that an order be entered thereupon that the petitioner be discharged from custody of the respondent.

/s/ Kenneth L. Behrens
KENNETH L. BEHRENS, Petitioner

Sworn to and subscribed before me this 15th day of February, 1962.

/s/ W. L. Tappana

W. L. Tappana, Administrative Assistant, Medical Center for Federal Prisoners, Springfield, Missouri.

Administrative Assistant (Record Clerk) Authorized by the Act of July 7, 1955, to Administer Oaths (18 USC 4004)

[fol. 37]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 60-CR-26

KENNETH L. BEHRENS, PETITIONER
v.
UNITED STATES OF AMERICA, RESPONDENT

ORDER DENYING MOTION TO VACATE SENTENCE—
April 11, 1962

This cause came before the court upon the motion of petitioner to vacate sentence under Section 2255, Title 28, United States Code. After considering said motion, and being duly advised in the premises, the motion to vacate sentence is hereby DENIED.

In support of the above, the court relies primarily upon the following:

(1) The petitioner could not be harmed by what occurred at the time of entry of judgment and sentencing.

(2) Even if it be assumed that false testimony was given at petitioner's trial, which it is not, this is not grounds for vacation of judgment and sentence under Section 2255 where it does not appear that the testimony was known to be false by the prosecuting authorities. *United States* v. *Jakalski*, 237 F.2d 503 (7th Cir. 1956), *cert. denied*, 353 U.S. 939 (1957). Nor does an unsupported charge of perjury entitle petitioner to a hearing. [fol. 38] *United States* v. *Spadafora*, 200 F.2d 140 (7th Cir. 1952).

(3) The alleged contradictory statements appear to be no more than trivial conflicts, which do not constitute perjury, and which merely present questions for the jury to resolve. *United States* v. *Spadafora*, *supra*, 200 F.2d at 142.

(4) As to the failure to grant a mental examination, as requested, prior to trial, this involves an error of law, if anything, and should have been raised by timely appeal. *United States* v. *Spadafora*, 207 F. 2d 291 (7th Cir. 1953).

/s/ William E. Steckler
United States District Judge

[fols. 39-44] • • •

[fol. 45]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13756 September Term, 1962
September Session, 1962

KENNETH LEROY BEHRENS, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

OPINION—December 26, 1962

Before DUFFY, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* Kenneth Leroy Behrens, the petitioner-appellant, was found guilty by a jury of assault with intent to murder in violation of 18 U.S.C.A. § 113(a). Judgment was entered on the verdict and the petitioner was committed to the custody of the Attorney General pursuant to 18 U.S.C.A. § 4208(b).[1] The Bureau of Prisons was granted a 30 day and a 60 day extension of the three month period for study of the petitioner

[1] The judgment and commitment order provided, inter alia, that:

"It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) years, and for a study as described in Title 18 U. S. C. 4208(c), the results of such study to be furnished the Court within Three (3) months, whereupon the sentence of imprisonment shall be subject to modification in accordance with Title 18 U. S. C. 4208(b)".

in order to complete a psychiatric examination. On June 13, 1961, after having received and considered the Bureau's report on its study of the petitioner, the District Court entered an order modifying the previous judgment and providing "that the period of imprisonment heretofore imposed be reduced to Five (5) years".
[fol. 46] Thereafter, the petitioner filed a motion to vacate sentence. Jurisdiction was predicated on 28 U.S.C.A. § 2255. The District Court denied the motion and petitioner appealed.

Petitioner's main contentions on appeal are that the District Court's denial of his oral motion for a mental examination constituted a denial of due process and that the absence of petitioner and his counsel at the time the court modified petitioner's commitment makes the reduced sentence subject to collateral attack for want of due process in its imposition.

We find no error in the District Court's rejection of the denial of the petitioner's motion for a mental examination as affording a basis for relief under § 2255. It was an oral motion made at the commencement of the trial and after the jury had been sworn, but out of its presence. 18 U.S.C.A. § 4244 contemplates that a motion on behalf of an accused for a judicial determination of mental competency to stand trial shall set forth the ground for belief that such mental capacity is lacking. The oral motion failed to do this, and although the trial court did entertain the motion and consider it on its merits, no showing was made which required that a mental examination be ordered. Moreover, petitioner's trial court counsel stated that petitioner was, in his opinion, fully able to understand the charges against him and assist in his defense. The only showing adduced to support the motion was defense counsel's statement that petitioner's medical record revealed that he had once cut himself and "[A]ny cutting of one's self is fairly serious". Under the circumstances here presented it was not error or a deprival of due process to deny the motion for a mental examination. Cf. *Krupnick* v. *United States*, 8 Cir., 264 F. 2d 213, 216.

Although 18 U.S.C.A. § 4208(b) authorizes a commitment of a convicted defendant for a study to serve as an

aid in determining the sentence to be imposed there is no final determination of the actual sentence until affirmative action is taken after the reports and recommendations resulting from the study have been received. In this respect § 4208(b) provides:

> "If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed [fol. 47] to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section".

And the report to be made pursuant to §4208(c) relates to the following data:

> "[T]he prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent".

If probation is not granted, either an affirmance of the maximum sentence of imprisonment prescribed by law for the offense (which maximum sentence the statute deems to have been imposed) or a reduction of that sentence, is required. That the term of the sentence as then fixed by affirmance or reduction is to run from the date of the original commitment serves merely to assure the con-

victed defendant of credit for the period devoted to the study—the statute thus fixes the starting point of the sentence whenever it is utilized in determining punishment, but the duration of the sentence must await final determinative action of the court in affirming the maximum term or reducing it. Until such action occurs no definite and final sentence has been imposed.

In *Parr* v. *United States*, 351 U. S. 513, 518, it was observed that the rule that in general, a judgment is final only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined, applies in criminal as well as civil cases.

[fol. 48] In our opinion that rule is applicable here and fundamental requirements of due process made it essential that the petitioner be present at the time of such imposition of sentence, and that his right to have his counsel present be honored. Rule 43, Federal Rules of Criminal Procedure (18 U.S.C.A.) required the presence of the defendant. Rule 44 recognizes his right to be represented by his counsel "at every stage of the proceeding" in harmony with the guarantee of the Sixth Amendment. A sentencing, even to probation, is admittedly invalid in the defendant's absence. *Pollard* v. *United States*, 352 U. S. 354, 360. The Solicitor General in a memorandum submitted in *Grabina* v. *United States*, 369 U. S. 426 conceded that absence of a defendant at the time of sentencing was "fundamental error" and under such circumstances "there are basic infirmities in the sentence".[2] Cf. *Ellis* v. *Ellisor*, 5 Cir., 239 F. 2d 175; *Wilfong* v. *Johnston*, 9 Cir., 156 F. 2d 507.

We have considered *United States* v. *DeBlasis*, 177 F. Supp. 484 (D. Md. 1959); *United States* v. *DeBlasis*, 206 F. Supp. 38 (D. Md. 1962) and *United States* v. *Johnson*, 207 F. Supp. 115 (E. D. N. Y. 1962) in each of which it is held that the presence of the defendant at the time of a reduction in the maximum term of imprisonment pursuant to § 4208(b) is not required. We have

[2] See excerpt from Solicitor General's memorandum submitted in *Grabina* quoted in *United States* v. *DeBlasis*, 206 F. Supp. 38, 39-40.

also considered the construction placed on § 4208(b) in *Corey* v. *United States*, 1 Cir., 307 F. 2d 839 and *United States* v. *Behrens*, 190 F. Supp. 799 (S. D., Ind. 1961).[3] But we are of the view that these cases rely too heavily on terminology employed in the statute which, in the context used, is at best ambiguous.

To regard the maximum term of imprisonment "deemed" to have been imposed by § 4208(b) as an actual sentencing of the defendant, even where, as here, the maximum term is expressly written into the judgment order, is, in our considered judgment, directly contrary to the express intent and purpose of the section. The declared object and purpose of § 4208(b) is to enable the court to obtain such detailed information as may aid it in determining the actual sentence to be imposed. It is for this purpose that § 4208(b) authorizes and provides [fol. 49] for a limited postponement of definitive action until the study is made and the reports and recommendations received. The action to be taken under § 4208(b) is unlike a reduction of sentence made under Rule 35, Federal Rules of Criminal Procedure. Rule 35 admits of a discretionary reduction of a sentence already definitively imposed and Rule 43 properly dispenses with the defendant's presence for such purpose. But, under § 4208(b) until the "affirmance" of the maximum term of imprisonment or its "reduction" no definitive sentence has been imposed—there is no sentence.

And, it is at the time when the actual definitive sentence which is to be served is imposed that the presence of the defendant and his right to advice of counsel is meaningful. It is only then that in many cases an intelligent decision as to appeal can be made. Probation or a light sentence may well be a determinative influence on whether an appeal is to be taken. Moreover, the right of allocution is more crucial when the court is about to pronounce the actual sentence the defendant is to serve

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[3] We have also noted the several different views as to whether an offender must be returned to the court for sentencing following a 4208(b) commitment existing among those who have had occasion to express themselves on the subject. Seminar & Institute on Disparity of Sentences, 30 F. R. D. 401, 439.

—more so than when the court merely permits the statute to automatically prescribe the maximum imprisonment until the court can more intelligently appraise pertinent factors in the light of more detailed information and make the actual determination as to what the sentence shall be. We do not read *Hill* v. *United States*, 368 U.S. 424, or *Machebroda* v. *United States*, 368 U.S. 487, as placing beyond the purview of relief under 28 U.S.C.A. § 2255 a situation where absence of the defendant shows the defendant was affirmatively denied an opportunity to speak at the time his actual sentence was imposed. In *Hill*, where defendant and his counsel were present at the time sentence was imposed, the Court was careful to point out (p. 429):

> "It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed.
>
> * * * *
>
> Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider."

[fol. 50] We therefore conclude that the District Court erred in denying petitioner's motion to vacate the sentence. But, the underlying judgment of conviction is not affected by the infirmity of the sentencing procedure and, accordingly, we reverse and remand with directions that the judgment order of June 13, 1961, be vacated and that the District Court proceed to cause the petitioner to be returned before the bar of the court for further proceedings in the exercise of its jurisdiction under Section 4208(b), Title 18 U. S. Code, consistent with the views herein expressed.

Mr. Aribert L. Young of the Indianapolis bar has ably served the petitioner in this appeal as counsel by appointment of this Court. We express our appreciation of those services.

REVERSED AND REMANDED.

[fol. 51] KNOCH, *Circuit Judge* (dissenting). I agree with the majority of this Court in affirming the underlying judgment of conviction in this case. I am, however, unable to agree that the District Court erred in denying petitioner's motion to vacate the sentence.

It may well be the better practice in some instances to produce the defendant in court when the sentence previously imposed is to be modified in accordance with the provisions of Title 18, U.S.C., § 4208(b). For example, where the Court is going to grant probation, personal instruction may be required properly to impress the defendant with the serious nature of probation and the grave consequences of violating its rules and provisions.

However, this question must be a matter for the Trial Judge's sound discretion in the light of the circumstances of a particular case. It is not an essential for due process.

In the matter before us, the defendant and his counsel were afforded the usual right of allocution at the time that the original sentence was imposed. That was defendant's opportunity to present all matters in mitigation. The fact that trial tactics might be better served by presenting, or repeating, these matters at a later time should not alter procedures. Neither should the fact that the Trial Judge may later modify the sentence originally imposed, after consideration of information to be acquired from another source. The procedure under Title 18, U.S.C., §4208(b) is analogous to that under Rule 35, Federal Rules of Criminal Procedure. The sentence cannot be increased. It can only be left unmodified or reduced.

In the matter before us, the disposition of the case, made while the defendant was present in open court, left open only one question. That question was to be resolved through medical examination, over a period of time, by competent authorities who were to report their findings to the Court. There was no need to consult the defendant; there was no need for the defendant to be present in court. This was solely a matter for the Judge's consideration of the expert medical advice he was to receive.

Unnecessary transfer of prisoners multiplies opportunities for escape and has upon occasion created serious dangers not only to those charged with the care of the prisoner but to the public at large. Transfer away from the institution of confinement should be employed only when important rights of the prisoner demand it.
[fol. 52] With the flood of correspondence which reaches judges from the penal institutions, at every conceivable provocation, it would appear that a defendant might communicate by mail if there were any particular matters to which he wished to invite the Trial Judge's attention in connection with the report which he knew was being prepared.

Unlike the majority, I find the *Corey* case persuasive. I am convinced that extension of the time for appeal is not contemplated by the statute.

* * * *

[fol. 53]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before

Hon. F. RYAN DUFFY, Circuit Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge

No. 13756

KENNETH LEROY BEHRENS, PETITIONER-APPELLANT

vs.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division

JUDGMENT—December 26, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is the conclusion of this Court that the District Court erred in denying petitioner's motion to vacate the sentence, but, the underlying judgment of conviction is not affected by the infirmity of the sentencing procedure and, accordingly, it is ordered and adjudged by this Court that the order of the said District Court denying petitioner's motion to vacate the sentence be, and the same is hereby, REVERSED, and that this cause be, and it is hereby REMANDED to the said District Court with directions that the judgment order of June 13, 1961, be vacated and that the District Court proceed to cause the petitioner to be returned before the bar of the court for further proceedings in the exercise of its jurisdiction under Section 4208(b), Title 18

U.S. Code, consistent with the views expressed in the opinion of this Court filed this day.

[fol. 54]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 55]

SUPREME COURT OF THE UNITED STATES

No. 903, October Term, 1962

UNITED STATES, PETITIONER

vs.

KENNETH LEROY BEHRENS

ORDER ALLOWING CERTIORARI.—April 29, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar. The case is set for oral argument immediately following No. 569.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 689527 1235

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH LEROY BEHRENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, reversing the denial of a motion collaterally attacking the judgment for failure to have respondent present when his sentence was reduced under the provisions of 18 U.S.C. 4208(b).

OPINIONS BELOW

The opinion of the court of appeals (II R. 2; App. *infra*, pp 8–16) [1] has not yet been reported. An opinion of the district court in a previous proceeding is reported at 190 F. Supp. 799.

[1] The original district court record is designated "R.". The certified record of the proceedings in the court of appeals is designated "II R.". The certified transcript of the original sentencing in the district court is designated "Tr.".

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1962 (II R. 3; App. *infra*, p. 17). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Under the provisions of Section 4208 of the Criminal Code, respondent was sentenced to the maximum term for the offense of which he had been convicted. Thereafter, following receipt of a report from the Bureau of Prisons, the district court reduced the sentence from twenty years to five years. The question presented is whether the latter sentence was subject to collateral attack because neither respondent nor his counsel was present when the modification took place.

STATUTE AND RULES INVOLVED

18 U.S.C. 4208(b) provides:

> If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for

further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35 provides in pertinent part:

> * * * The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 43 provides in pertinent part:

> * * * The defendant's presence is not required at a reduction of sentence under Rule 35.

STATEMENT

Kenneth Leroy Behrens was convicted by a jury on December 20, 1960, in the United States District Court for the Southern District of Indiana, of an assault with the intent to commit murder within the special maritime and territorial jurisdiction of the United States (Federal Penitentiary), in violation of 18 U.S.C. 113(a) (R. 5, 15). Upon conviction, the court inquired of the parties whether a probation report was necessary in view of respondent's known

record; it also requested their suggestions as to whether it should invoke the sentencing procedures set forth in 18 U.S.C. 4208 (Tr. 3). It was the view of the government that no benefit could be derived from a probation report in this case, but that either a sentence under 18 U.S.C. 4208 or one of the court's own determination would be proper (Tr. 3–4). The respondent wished to have the case disposed of that day with entry of a final judgment (Tr. 4–5). The court stated (Tr. 11):

> Well, since it is the desire of the Defendant to have this case disposed of today, I will dispose of it today. But it will be under the flexible provisions of 4208 * * *.

Thereafter the trial court afforded respondent an opportunity to make a statement but he elected to remain silent (Tr. 11–12).

The court sentenced respondent to imprisonment for a period of twenty years (the maximum), ordered that a study be made in accord with 18 U.S.C. 4208(c), and stated that, after the results were furnished to the court, the sentence would be subject to modification under the provisions of 18 U.S.C. 4208(b) (Tr. 17; R. 18).

On January 17, 1961, respondent sought leave to obtain a transcript *in forma pauperis* (R. 19–20). This was denied on the ground that his time to appeal had expired on December 30, 1960 (R. 23–25). See *United States* v. *Behrens*, 190 F. Supp. 799 (S.D. Ind.).

On June 13, 1961, the district court, after considering the report of the Bureau of Prisons, entered a

further order without requiring the presence of Behrens or his counsel; it provided "that the period of imprisonment heretofore imposed be reduced to Five (5) years" and that, under the provisions of 18 U.S.C. 4208(a)(2), the board of parole could decide when the respondent should be eligible for parole (R. 28).

On February 21, 1962, the respondent, *pro se,* filed a motion to vacate sentence which was considered under the provisions of 28 U.S.C. 2255 and denied on April 11, 1962 (R. 30–38). On April 25, 1962, the trial court granted leave to appeal *in forma pauperis* from the denial of the motion (R. 39–40). In the court of appeals, respondent's counsel argued, *inter alia,* that the absence of respondent and his counsel at the time of the reduction in sentence presented a serious question of due process.

The court of appeals held (one judge dissenting) that, when the procedures of Section 4208(b) (*supra,* pp. 2–3) are followed, the "actual definitive sentence" (App. *infra,* p. 13) is not the one originally imposed but, rather, the sentence which is fixed following the trial judge's receipt of a report and recommendations. It concluded that, as a matter of due process, petitioner and his counsel were entitled to be present at the latter sentencing and that petitioner had a right to be heard (the right of allocution) at that time.

The dissenting judge was of the view that the final judgment disposing of the criminal case was the original sentence entered by the court and that accordingly it was discretionary with the trial judge

whether to bring the defendant back to the courtroom and to hear him on the question of modification.

REASONS FOR GRANTING THE WRIT

On January 21, 1962, this Court granted certiorari in *Corey* v. *United States*, 307 F. 2d 839 (C.A. 1), No. 569, O.T. 1962, which presented the question, when does the time for appeal begin to run in cases in which the trial court adopts the sentencing procedure set forth in 18 U.S.C. 4208(b). The court of appeals held in *Corey* that the original judgment, not the reduced sentence, marked the beginning of the period. While the petition in *Corey* was pending before the Court, we invited attention to the decision below, pointing out that it adopts a contrary approach—one which treats the ultimate reduction of sentence as the final judgment in the criminal case.

There is, to be sure, a difference between the two cases. In *Corey*, the question whether the original sentence constituted the final judgment was crucial to the question whether an appeal was timely. Here, the question whether the original sentence terminated the main criminal case is significant because petitioner was not present (as he was plainly entitled to be if the case was still awaiting a final judgment) when the sentence was changed from a 20-year term of imprisonment to a 5-year term. The difference, however, makes plain that the two questions are intimately related. It is to be noted in this connection that the majority below has indicated its disagreement with *Corey* (App. *infra*, pp. 12–13).

In view of the fact that district courts are employing the procedures authorized by Section 4208 with increasing frequency, we believe it important that there be a definitive interpretation by this Court of its provisions and of their bearing both upon sentencing and appellate procedures. If the instant case is heard together with the *Corey* case, the Court will be in a position to consider the variant aspects of a general problem in the administration of criminal justice which has now become manifest.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted, and that the matter be set for hearing with *Corey* v. *United States*, No. 569, O.T. 1962, certiorari granted, January 21, 1962.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

MARCH 1963.

APPENDIX

In the United States Court of Appeals for the Seventh Circuit

No. 13756 SEPTEMBER TERM, 1962
SEPTEMBER SESSION, 1962

KENNETH LEROY BEHRENS, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, TERRE HAUTE DIVISION

December 26, 1962

Before DUFFY, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* Kenneth Leroy Behrens, the petitioner-appellant, was found guilty by a jury of assault with intent to murder in violation of 18 U.S.C.A. § 113(a). Judgment was entered on the verdict and the petitioner was committed to the custody of the Attorney General pursuant to 18 U.S.C.A. § 4208(b).[1] The Bureau of Prisons was granted a

[1] The judgment and commitment order provided, inter alia, that:

"It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) years,

30 day and a 60 day extension of the three month period for study of the petitioner in order to complete a psychiatric examination. On June 13, 1961, after having received and considered the Bureau's report on its study of the petitioner, the District Court entered an order modifying the previous judgment and providing "that the period of imprisonment heretofore imposed be reduced to Five (5) years".

Thereafter, the petitioner filed a motion to vacate sentence. Jurisdiction was predicated on 28 U.S.C.A. § 2255. The District Court denied the motion and petitioner appealed.

Petitioner's main contentions on appeal are that the District Court's denial of his oral motion for a mental examination constituted a denial of due process and that the absence of petitioner and his counsel at the time the court modified petitioner's commitment makes the reduced sentence subject to collateral attack for want of due process in its imposition.

We find no error in the District Court's rejection of the denial of the petitioner's motion for a mental examination as affording a basis for relief under § 2255. It was an oral motion made at the commencement of the trial and after the jury had been sworn, but out of its presence. 18 U.S.C.A. § 4244 contemplates that a motion on behalf of an accused for a judicial determination of mental competency to stand trial shall set forth the ground for belief that such mental capacity is lacking. The oral motion failed to do this, and although the trial court did

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and for a study as described in Title 18 U.S.C. 4208(c), the results of such study to be furnished the Court within Three (3) months, whereupon the sentence of imprisonment shall be subject to modification in accordance with Title 18 U.S.C. 4208(b)".

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entertain the motion and consider it on its merits, no showing was made which required that a mental examination be ordered. Moreover, petitioner's trial court counsel stated that petitioner was, in his opinion, fully able to understand the charges against him and assist in his defense. The only showing adduced to support the motion was defense counsel's statement that petitioner's medical record revealed that he had once cut himself and "[A]ny cutting of one's self is fairly serious". Under the circumstances here presented it was not error or a deprival of due process to deny the motion for a mental examination. Cf. *Krupnick* v. *United States*, 8 Cir., 264 F. 2d 213, 216.

Although 18 U.S.C.A. § 4208(b) authorizes a commitment of a convicted defendant for a study to serve as an aid in determining the sentence to be imposed there is no final determination of the actual sentence until affirmative action is taken after the reports and recommendations resulting from the study have been received. In this respect § 4208(b) provides:

> "If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2)

> affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section".

And the report to be made pursuant to § 4208(c) relates to the following data:

> "[T]he prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent".

If probation is not granted, either an affirmance of the maximum sentence of imprisonment prescribed by law for the offense (which maximum sentence the statute deems to have been imposed) or a reduction of that sentence, is required. That the term of the sentence as then fixed by affirmance or reduction is to run from the date of the original commitment serves merely to assure the convicted defendant of credit for the period devoted to the study—the statute thus fixes the starting point of the sentence whenever it is utilized in determining punishment, but the duration of the sentence must await final determinative action of the court in affirming the maximum term or reducing it. Until such action occurs no definite and final sentence has been imposed.

In *Parr* v. *United States*, 351 U.S. 513, 518, it was observed that the rule that in general, a judgment is final only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined, applies in criminal as well as civil cases.

In our opinion that rule is applicable here and fundamental requirements of due process made it

essential that the petitioner be present at the time of such imposition of sentence, and that his right to have his counsel present be honored. Rule 43, Federal Rules of Criminal Procedure (18 U.S.C.A.) required the presence of the defendant. Rule 44 recognizes his right to be represented by his counsel "at every stage of the proceeding" in harmony with the guarantee of the Sixth Amendment. A sentencing, even to probation, is admittedly invalid in the defendant's absence. *Pollard* v. *United States*, 352 U.S. 354, 360. The Solicitor General in a memorandum submitted in *Grabina* v. *United States*, 369 U.S. 426 conceded that absence of a defendant at the time of sentencing was "fundamental error" and under such circumstances "there are basic infirmities in the sentence".[2] Cf. *Ellis* v. *Ellisor*, 5 Cir., 239 F. 2d 175; *Wilfong* v. *Johnston*, 9 Cir., 156 F. 2d 507.

We have considered *United States* v. *DeBlasis*, 177 F. Supp. 484 (D. Md. 1959); *United States* v. *DeBlasis*, 206 F. Supp. 38 (D. Md. 1962) and *United States* v. *Johnson*, 207 F. Supp. 115 (E.D.N.Y. 1962) in eaclr of which it is held that the presence of the dedendant at the time of a reduction in the maximum term of imprisonment pursuant to § 4208(b) is not required. We have also considered the construction placed on § 4208(b) in *Corey* v. *United States*, 1 Cir., 307 F. 2d 839 and *United States* v. *Behrens*, 190 F. Supp. 799 (S.D., Ind. 1961).[3] But we are of the view

[2] See excerpt from Solicitor General's memorandum submitted in *Grabina* quoted in *United States* v. *DeBlasis*, 206 F. Supp. 38, 39–40.

[3] We have also noted the several different views as to whether an offender must be returned to the court for sentencing following a 4208(b) commitment existing among those who have had occasion to express themselves on the subject. Seminar & Institute on Disparity of Sentences, 30 F.R.D. 401, 439.

that these cases rely too heavily on terminology employed in the statute which, in the context used, is at best ambiguous.

To regard the maximum term of imprisonment "deemed" to have been imposed by § 4208(b) as an actual sentencing of the defendant, even where, as here, the maximum term is expressly written into the judgment order, is, in our considered judgment, directly contrary to the express intent and purpose of the section. The declared object and purpose of § 4208(b) is to enable the court to obtain such detailed information as may aid it in determining the actual sentence to be imposed. It is for this purpose that § 4208(b) authorizes and provides for a limited postponement of definitive action until the study is made and the reports and recommendations received. The action to be taken under § 4208(b) is unlike a reduction of sentence made under Rule 35, Federal Rules of Criminal Procedure. Rule 35 admits of a discretionary reduction of a sentence already definitively imposed and Rule 43 properly dispenses with the defendant's presence for such purpose. But, under § 4208(b) until the "affirmance" of the maximum term of imprisonment or its "reduction" no definitive sentence has been imposed—there is no sentence.

And, it is at the time when the actual definitive sentence which is to be served is imposed that the presence of the defendant and his right to advice of counsel is meaningful. It is only then that in many cases an intelligent decision as to appeal can be made. Probation or a light sentence may well be a determinative influence on whether an appeal is to be taken. Moreover, the right of allocution is more crucial when the court is about to pronounce the actual sentence the defendant is to serve—more so than when the court

merely permits the statute to automatically prescribe the maximum imprisonment until the court can more intelligently appraise pertinent factors in the light of more detailed information and make the actual determination as to what the sentence shall be. We do not read *Hill* v. *United States*, 368 U.S. 424, or *Machibroda* v. *United States*, 368 U.S. 487, as placing beyond the purview of relief under 28 U.S.C.A. § 2255 a situation where absence of the defendant shows the defendant was affirmatively denied an opportunity to speak at the time his actual sentence was imposed. In *Hill*, where defendant and his counsel were present at the time sentence was imposed, the Court was careful to point out (p. 429):

> "It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed.
>
> * * * * *
>
> Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider."

We therefore conclude that the District Court erred in denying petitioner's motion to vacate the sentence. But, the underlying judgment of conviction is not affected by the infirmity of the sentencing procedure and, accordingly, we reverse and remand with directions that the judgment order of June 13, 1961, be vacated and that the District Court proceed to cause the petitioner to be returned before the bar of the court for further proceedings in the exercise of its jurisdiction under Section 4208(b), Title 18, U.S. Code, consistent with the views herein expressed.

Mr. Aribert L. Young of the Indianapolis bar has ably served the petitioner in this appeal as counsel by appointment of this Court. We express our appreciation of those services.

REVERSED AND REMANDED.

KNOCH, Circuit Judge (dissenting). I agree with the majority of this Court in affirming the underlying judgment of conviction in this case. I am, however, unable to agree that the District Court erred in denying petitioner's moton to vacate the sentence.

It may well be the better practice in some instances to produce the defendant in court when the sentence previously imposed is to be modified in accordance with the provisions of Title 18, U.S.C., § 4208(b). For example, where the Court is going to grant probation, personal instruction may be required properly to impress the defendant with the serious nature of probation and the grave consequences of violating its rules and provisions.

However, this question must be a matter for the Trial Judge's sound discretion in the light of the circumstances of a particular case. It is not an essential for due process.

In the matter before us, the defendant and his counsel were afforded the usual right of allocution at the time that the original sentence was imposed. That was defendant's opportunity to present all matters in mitigation. The fact that trial tactics might be better served by presenting, or repeating, these matters at a later time should not alter procedures. Neither should the fact that the Trial Judge may later modify the sentence originally imposed, after consideration of information to be acquired from another source. The procedure under Title 18, U.S.C., § 4208(b) is analogous to that under Rule 35, Federal Rules of Crimi-

nal Procedure. The sentence cannot be increased. It can only be left unmodified or reduced.

In the matter before us, the disposition of the case, made while the defendant was present in open court, left open only one question. That question was to be resolved through medical examination, over a period of time, by competent authorities who were to report their findings to the Court. There was no need to consult the defendant; there was no need for the defendant to be present in court. This was solely a matter for the Judge's consideration of the expert medical advice he was to receive.

Unnecessary transfer of prisoners multiplies opportunities for escape and has upon occasion created serious dangers not only to those charged with the care of the prisoner but to the public at large. Transfer away from the institution of confinement should be employed only when important rights of the prisoner demand it.

With the flood of correspondence which reaches judges from the penal institutions, at every conceivable provocation, it would appear that a defendant might communicate by mail if there were any particular matters to which he wished to invite the Trial Judge's attention in connection with the report which he knew was being prepared.

Unlike the majority, I find the *Corey* case persuasive. I am convinced that extension of the time for appeal is not contemplated by the statute.

A true Copy:

Teste:

_____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT

Wednesday, December 26, 1962

* * * * * *

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is the conclusion of this Court that the District Court erred in denying petitioner's motion to vacate the sentence, but, the underlying judgment of conviction is not affected by the infirmity of the sentencing procedure and, accordingly, it is ordered and adjudged by this Court that the order of the said District Court denying petitioner's motion to vacate the sentence be, and the same is hereby, REVERSED, and that this cause be, and it is hereby REMANDED to the said District Court with directions that the judgment order of June 13, 1961, be vacated and that the District Court proceed to cause the petitioner to be returned before the bar of the court for further proceedings in the exercise of its jurisdiction under Section 4208(b), Title 18 U.S. Code, consistent with the views expressed in the opinion of this Court filed this day.

U.S. GOVERNMENT PRINTING OFFICE: 1963

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CITATIONS

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 86

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH LEROY BEHRENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 30–37) is reported at 312 F. 2d 223. An opinion of the district court in a previous proceeding is reported at 190 F. Supp. 799 (S.D. Ind.).

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1962 (R. 38–39). The petition for a writ of certiorari was filed on March 7, 1963, and was granted on April 29, 1963 (R. 39, 373 U.S. 902). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the respondent was required to be present when his sentence was reduced and modified under the provisions of 18 U.S.C. 4208(b).

STATUTE AND RULES INVOLVED

18 U.S.C. 4208 provides in pertinent part:

§ 4208. *Fixing eligibility for parole at time of sentencing.*

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be

helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or. (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary.

It shall be the duty of the various probation officers and government bureaus and agencies to furnish the board of parole information concerning the prisoner, and, whenever not in-

compatible with the public interest, their views and recommendations with respect to the parole disposition of his case.

* * * * *

Federal Rules of Criminal Procedure

Rule 35 provides in pertinent part:

> * * * The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 43 provides in pertinent part:

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. * * * The defendant's presence is not required at a reduction of sentence under Rule 35.

STATEMENT

On December 20, 1960, the respondent was convicted by a jury, in the United States District Court for the Southern District of Indiana, of an assault with intent to murder within the special maritime and territorial jurisdiction of the United States (Federal Penitentiary), in violation of 18 U.S.C. 113(a) (R. 2, 4-5, 7). After the conviction, the trial judge discussed with counsel the question of fixing sentence—whether to impose one immediately, to await a presentence report, or to invoke the procedure prescribed

in 18 U.S.C. 4208(b) (R. 8–9). The respondent stated that he desired to have the case disposed of that day (R. 9). The judge indicated that he favored the use of Section 4208(b) in this case because his past experience had shown that no sentence could act as a deterrent to the commission of penitentiary offenses (R. 10–11). It was the court's view that the penal authorities should make a study of this type of criminal activity. The judge indicated that since this was an internal penal problem he would be inclined to follow their recommendation under section 4208 (R. 12). He also encouraged the respondent to try to do better (R. 12). Then the court stated (R. 12):

> Well, since it is the desire of the Defendant to have this case disposed of today, I will dispose of it today. But it will be under the flexible provisions of 4208 * * *.

The judge afforded the respondent an opportunity to make a statement but respondent declined to do so despite encouragement from the judge (R. 13). In response to a question as to whether respondent had any remorse, Behrens replied (R. 13):

> My remarks ain't fit in your ears.
> The COURT: None whatsoever?
> The DEFENDANT: (Shakes head.)
> The COURT: Have you given up entirely?
> The DEFENDANT: It's just simpler to get it over with.

The court then heard again from respondent's counsel and agreed that Behrens needed help (R. 13–14). The judge stated he would be inclined to impose a

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very substantial sentence, except that he was convinced that maximum sentences in these cases provided no deterrence (R. 14).

The court then imposed a sentence of imprisonment for twenty years (the maximum), directed the study prescribed in the statute, and provided that, after the results were furnished to the court, "the sentence of imprisonment herein imposed shall be subject to modification in accordance with Title 18, United States Code, Section 4208(b)." (R. 15–16.) A written judgment was then entered (R. 17–18).

On January 17, 1961, respondent sought leave to obtain a transcript in forma pauperis (R. 19–20). The request was denied on the ground that the time to appeal had expired on December 30, 1960, so that the transcript would be useless (R. 21–22). See *United States* v. *Behrens,* 190 F. Supp. 799 (S.D. Ind.).

On June 13, 1961, the district court, after considering the report of the Bureau of Prisons, but without requiring the presence of respondent or his counsel, entered an order providing "that the period of imprisonment heretofore imposed be reduced to Five (5) years" and that, under the provisions of 18 U.S.C. 4208(a)(2), the Board of Parole could decide when the respondent should be eligible for parole (R. 23).

On February 21, 1962, respondent, *pro se,* submitted a motion to vacate sentence[1] which was considered under the provisions of 28 U.S.C. 2255 and denied on

[1] The motion primarily complained of contradictory evidence at the trial, the judge's remarks at the sentencing, and the denial of a request for mental examination on the first day of trial (R. 24–27).

April 11, 1962 (R. 28–29). In the court of appeals, respondent's counsel argued, *inter alia*, that the absence of respondent and his counsel at the time of the reduction in sentence presented a serious question of due process.

A majority on the court of appeals held that it was a fundamental requirement of due process that respondent be present, with counsel, and have an opportunity for allocution at the time the sentence was reduced. The court reasoned that the reduced sentence under the special provisions of 18 U.S.C. 4208 (b) was the "final judgment" which terminated the litigation, rather than the sentence as originally imposed, and that the right of allocution was thus more important at that time (R. 30–35).

The dissenting judge was of the view that the presence of the defendant was not required by due process and that the matter was one for the sound discretion of the trial judge, to be exercised in the light of the circumstances of each case. He noted that in the case at bar there was no need to consult the defendant but only to consider the expert medical advice. He therefore concluded that the district court in this instance had not abused its discretion in failing to require petitioner's presence at the reduction of sentence (R. 36–37).

ARGUMENT

INTRODUCTION AND SUMMARY

The question here—whether a defendant must be present if a maximum sentence imposed preliminarily under 18 U.S.C. 4208(b) is reduced—is closely allied to the question presented in *Corey* v. *United States*,

No. 31, this Term: when the time to appeal begins to run if the procedures of that statute are utilized. As the statute is written, that question—what constitutes the final judgment for purpose of appeal—seems to be the same as the question what is the final judgment for the purpose of determining whether the defendant must be present. Nor is this a purely technical matter. The two questions have a close practical connection. Thus, if the Court should decide, contrary to our view in *Corey*, that a defendant should be allowed to take his appeal from the reduced sentence, this would be a consideration justifying the conclusion that he must be present at the time of the reduced sentence. For, if the defendant had no attorney, he could be advised by the court of his right to appeal pursuant to Rule 37(a)(2); and, if he did have counsel, he would have the opportunity to consult with counsel regarding an appeal. On the other hand, if there is no right of appeal from a reduced sentence, there is less reason to require a defendant's presence at that time.

In our brief in *Corey*, we limit our discussion to the narrow question of appealability. We undertake here to deal with the general purposes and legislative history of the statute. From this examination, we conclude that Congress intended the original maximum sentence imposed under Section 4208(b) to be the final judgment concluding the criminal case, both for the purpose of the appeal and for the purpose of determining whether the presence of the defendant is required.

I

The language, history and background of the statute indicate that the initial sentence (deemed to be for the maximum term) is the final judgment concluding the criminal case and that Congress did not require that the defendant be present when the sentence is affirmed or reduced.

A. Section 4208 was one of three parts of a bill passed in 1958 to provide better sentencing methods. Its aim was to make possible the individualization of sentences by affording a variety of release techniques, all of them discretionary with the judge. Subsection (a) sets forth two methods of giving the Parole Board broader authority to release a prisoner if persuaded to do so by a diagnostic study. Subsection (b) enables the sentencing judge to avail himself of a diagnostic study, within a six-months period, for purposes of deciding upon a change of sentence. Plainly, under subsection (a), the first sentence is the final judgment for purposes of appeal and allocution, regardless of what term is actually served. There is a strong inference that Congress similarly regarded the criminal case as concluded by the initial sentence of imprisonment for purposes of subsection (b), and that the likelihood of a reduction in the term was not intended to affect the finality of the judgment of conviction. Although the statute is silent as to reappearance of the defendant, it significantly provides that whatever term must be served shall run from the date of the original commitment and forecloses any possibility of an increase in the indeterminate sentence.

B. The legislative history supports the view that the presence of a defendant is not required when sentence is affirmed or reduced. In the background were the Federal Youth Corrections Act, which contains an indeterminate sentence provision, and the Federal Rules of Criminal Procedure, which specifically declares that a sentence may be reduced without requiring the presence of the defendant. Rules 35 and 43. The same approach was followed in enacting Section 4208(b). Plainly, Congress did not view the action taken on reconsideration as the imposition of sentence requiring the presence of the defendant under Rule 43. In considering the new provision, Congress repeatedly stated that it desired to enable the sentencing judge to extend the period during which sentence might be reduced from 60 days (the limit under Rule 35) to a maximum of six months. The debates and reports also indicate that, as in proceedings under Rule 35, the sentence might be modified under the new procedure without requiring the presence of the defendant.

C. The weight of authority supports the view that trial judges should have discretion whether to require a return of the prisoner when his sentence is reduced. This is the view of the commentators, the judicial sentencing institutes and the various district courts which have considered the matter. The only cases to the contrary are the case at bar and a subsequent case currently pending on petition for certiorari.

II

Due process does not require the personal presence of an offender when his sentence is reduced.

A. Presence is not an element of due process in circumstances where the personal appearance of a defendant would not materially aid in resolution of the issue involved. While the Constitution provides that a defendant must be confronted by the witnesses against him, it is clear that many things before, during and after a trial may be accomplished in his absence. Sentencing, moreover, has always been recognized as discrete from the process by which guilt is determined.

There is no reason, from the standpoint of fundamental fairness, why a reduction in sentence under Section 4208(b) should require the defendant's presence. All of the normal incidents of the criminal case have been completed before a diagnostic study is made under Section 4208. A pre-sentence report has usually been prepared; counsel and defendant have been accorded an opportunity to be heard; a sentence has been imposed; it has been incorporated in a judgment forming the basis for an actual commitment to a federal penitentiary. The judge's conclusion that he may be aided by additional advice from other sources, *i.e.*, an expert diagnostic report, does not imply a practical necessity to hear further from the defendant. The defendant has no right to test the aids or the information which the judge utilizes in deciding upon an appropriate sentence. *Williams* v. *New York*, 337 U.S. 241. The question of his recall is properly committed to the informed discretion

of the district judge, who is in a position to determine whether any useful purpose would be served thereby.

B. This case illustrates the fairness of the procedures followed and the beneficial purposes of Section 4208. Before his initial sentencing, respondent was encouraged to speak in his own behalf. He refused to express any contrition and he offered no considerations in mitigation of his offense (assault with intent to murder, committed in a penitentiary). The judge expressed his opinion that the offender deserved a heavy sentence but nonetheless concluded that he would be guided by the recommendation of the prison authorities. Having invoked Section 4208 and having received a full report and study, the judge thereafter reduced the sentence from twenty years (the maximum) to five years, with further provision for still earlier release if the board of parole should decide that it was warranted.

If the judge, operating under customary procedures, had given a ten or twenty-year sentence in the first instance, it would not be seriously suggested that a further hearing would be required to pass upon a motion to reduce sentence. It is difficult to see on what basis the course which was actually followed—one which was essentially the same except that the judge was afforded the benefit of an expert diagnostic study—can be said to suffer from constitutional infirmity.

I

THE LANGUAGE OF THE STATUTE, ITS LEGISLATIVE HISTORY, AND ITS MANIFEST PURPOSE ALL INDICATE THAT THE INITIAL MAXIMUM SENTENCE IS THE FINAL JUDGMENT CONCLUDING THE CRIMINAL CASE AND THAT THE PRESENCE OF THE DEFENDANT IS NOT REQUIRED WHEN THAT SENTENCE IS SUBSEQUENTLY REDUCED

A. THE LANGUAGE AND STRUCTURE OF THE STATUTE SHOW THAT THE INITIAL JUDGMENT UNDER SECTION 4208(B) IS THE ONE THAT CONCLUDES THE CRIMINAL CASE

In 1958, in response to widespread sentiment, Congress enacted legislation to improve sentencing practices in the federal courts. The measure was in three parts. One provided for judicial sentencing institutes to be held in the various circuits. See 28 U.S.C. 334. Another part extended the application of the Federal Youth Corrections Act to offenders between 22 and 26. See 18 U.S.C. 4209 and 5010. The third portion of the legislation provided greater flexibility in the sentencing of adults.[2] This was 18 U.S.C. 4208, of which subsection (b) is before the Court.

Section 4208 is designed to make possible the individualization of sentences. This is accomplished by providing a variety of release techniques to be used at the discretion of the sentencing judge in meeting different situations. Subsection (a), *supra*, p. 2, permits a trial judge to delegate wide discretion to the Parole Board. He may "upon entering a judgment of conviction" either (1) set a date for eligi-

[2] These provisions do not apply to offenses where mandatory penalties are provided. 72 Stat. 847. See *Robinson* v. *United States*, 313 F. 2d 817 (C.A. 7).

bility for parole which is less than the normal one-third of the term [see 18 U.S.C. 4208(a)(1)], or (2) set a maximum sentence and allow the board of parole complete authority to determine when the offender will be eligible for parole [18 U.S.C. 4208(a)(2)]. Under Subsection (b) the judge initially commits the convict for the maximum term, subject to later revision. Here, however, it is the judge himself who reconsiders the sentence originally imposed. Within three months after sentencing (or six months, if he extends the time), the judge may (1) grant probation, (2) affirm the sentence, or (3) reduce the initial sentence. Under both subsections, the ultimate decision is made with the benefit of a diagnostic study of the offender in a penal institution, as provided in 18 U.S.C. 4208(c).[3]

There is, of course, no question but that under subsection (a) of Section 4208, the final sentence in the criminal case is that imposed by the judge, regardless of what sentence is actually served pursuant to the determinations of the Board of Parole. We believe that Congress similarly regarded the criminal case, as such, to be concluded by the initial sentence under Section 4208(b). In other words, the likelihood of a subsequent modification of the sentence by the trial

[3] For a description of how a diagnostic report under this section is prepared, see Bennett, *Evaluation of the Offender by the Bureau of Prisons*, 26 F.R.D. 231, 331–336; Bennett, *Individualizing the Sentencing Function*, 27 F.R.D. 293, 359, 362–363; Dr. Smith, *Observation and Study of Defendants Prior to Sentence*, 26 Federal Probation (June 1962), pp. 6–10. For a chart showing the use of the section by districts in 1962, see 32 F.R.D., 249, 316–317.

judge was not intended to affect the finality of the judgment of conviction.

While the statute itself is silent regarding the reappearance of a defendant, the structure of Section 4208 contemplates that all the normal procedures of a criminal case, which include the appearance of a defendant at his sentencing, will have been completed before the study provided by Section 4208 begins. No sentence can ever be increased under Section 4208(b). In essence, what the Act provides is that an indeterminate sentence is originally imposed, which can later be modified in a number of ways, either by the Board of Parole (under 4208(a)) or by the court (under 4208(b)), or by any combination which lends itself to an appropriate plan of rehabilitation for the offender. The words "[u]pon entering a judgment of conviction" which introduce subsection (a) reasonably apply as well to the alternate method of study provided in subsection (b). This is reinforced by the explicit provision in subsection (b) that whatever term the defendant must serve is to "run from date of original commitment under this section." In short, the initial commitment is the final judgment in the criminal case for which a defendant's presence is required.

B. THE LEGISLATIVE HISTORY SUPPORTS THE VIEW THAT THE PRESENCE OF THE DEFENDANT IS NOT REQUIRED WHEN HIS SENTENCE IS AFFIRMED OR REDUCED

1. *Historical background of the Act*

The present statute, 18 U.S.C. 4208(b), had its origin in long-standing dissatisfaction with sentencing techniques. While many States were experimenting

with various post-conviction solutions,[4] federal sentencing practices had not kept abreast of modern penology. A compilation in 1937 showed that there were indeterminate sentence laws of varying force and scope in thirty-nine jurisdictions, but none in the federal system. See 50 Harv. L. Rev. 677, 678, fn. 4.[5]

United States Attorneys General, for a number of years beginning in 1938, called attention to wide disparities and gross inequalities among sentences.[6] In 1938, a study of the problem undertaken in the Department of Justice was made available to the Judicial Conference,[7] which, in 1939, appointed a committee of Judges Learned Hand, Evans and Wilbur to consider an indeterminate sentence law.[8] The Judicial Conference for 1940 favored the adoption of a plan for indeterminate sentences drafted in the Attorney General's Office but modified so that a board in each circuit or at each federal prison should exercise the powers of a parole board. Insofar as pertinent, this draft provided:[9]

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[4] See Attorney General's Survey of Release Procedures, 1939, particularly Volume I.

[5] See also Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 Journal of the American Institute of Criminal Law and Criminology 9, 98–107.

[6] See Annual Report of The Attorney General of the United States, for fiscal year 1938, pp. 6–7; for fiscal year 1939, pp. 6–7; for fiscal year 1940, pp. 5–7; 27–28; for fiscal year 1941, pp. 11–12; for fiscal year 1943, pp. 18–19; for fiscal year 1944, pp. 37–38.

[7] Report of the Judicial Conference. September Session, 1938, p. 13.

[8] Report of the Judicial Conference. September Session, 1939, p. 11.

[9] Report of the Judicial Conference. October Session, 1940, pp. 14, 15.

Sec. 1. In any case in which a court of the United States imposes a sentence of imprisonment for an offense punishable by imprisonment for a term exceeding one year, such sentence shall be for the maximum term fixed by law. Within four months after any defendant commences to serve a sentence imposed as aforesaid, the Board of Indeterminate Sentence and Parole shall fix a definite term of imprisonment that the defendant shall serve. Such term shall not be more than the maximum term fixed by law in respect of the offense of which the defendant has been convicted; and if a minimum term is prescribed by law in respect of such offense, then the term fixed by said Board shall not be less than that so prescribed. In computing commutation for good conduct and in determining the date on which such defendant becomes eligible for parole, the term of imprisonment so fixed by the Board shall be deemed to be the term of imprisonment to which the defendant has been sentenced.

Sec. 2. * * * In addition, a hearing shall be accorded to the defendant before the Board or a member thereof, or before an examiner who shall report the proceedings to the Board. At such hearing the defendant shall have the privilege of being represented by counsel. * * *

* * * * *

Thus, early in the evolution of Section 4208(b), one finds the idea of imposing a modifiable indeterminate sentence which "shall be for the maximum term fixed by law."[10] Under the proposal just quoted, the defendant

[10] On the constitutionality of indeterminate sentences, the Attorney General's Survey of Release Procedures, Volume IV, p. 22, commented: "It is to be noted that it was only by holding

would never be returned to a court, since further proceedings would be reserved to the Board.

Opposition developed, principally on the ground that the proposed bill would take all control over sentences of more than one year out of the hands of trial judges.[11] The Judicial Conference proposed a further study under an expanded committee headed by Judge Parker.[12] A bill was approved which covered both adults and youthful offenders, but provided for the district judge to retain control of the sentence by modifying or affirming the sentence of the Board, if the judge so desired.[13] Introduced on March 10, 1943, as H.R. 2140, 78th Cong., 1st Sess.,[14] it provided in pertinent part (Title II):

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the indeterminate sentence to be in legal effect a sentence for the maximum term that the courts preserved it from the objection of uncertainty and indefiniteness."

[11] Report to the Judicial Conference of the Committee on Punishment for Crime, June 1942, p. 6. Consequently, early legislation was dropped. See, *e.g.*, S. 1638, 87 Cong. Rec. 5166, and H.R. 4581, H. Rep. 1071, 77th Cong., 1st Sess.

[12] Report of the Judicial Conference, September Session, 1941, p. 9. Meanwhile, the American Law Institute in May 1940, adopted a Youth Correction Authority Act providing that persons under twenty-one, upon conviction, could be sentenced generally to the authority. Under this proposal, commitment to the authority would not normally be stayed by taking an appeal. See American Law Institute, Youth Correction Authority Act, Official Draft (second printing) June 22, 1940, § 19, p. 19.

[13] It was contemplated that the bill would be effective only after a presentence report and after the judge had decided to sentence the defendant to imprisonment for more than one year. Report to the Judicial Conference of the Committee on Punishment for Crime, June 1942, p. 28.

[14] A similar bill was introduced in the Senate as S. 895.

Section 1. When the judge, after a hearing in open court, determines that a sentence of imprisonment for more than one year should be imposed on an offender, the original sentence shall be to imprisonment generally, which shall be for the maximum term prescribed by law. When an offender shall be sentenced for more than one offense, the court shall determine and specify whether the sentences shall run concurrently or consecutively. Within six months after an offender commences to serve the original sentence, or within an additional period not exceeding six months if authorized by the court, the Division shall recommend to the court the term of imprisonment to be fixed by the definite sentence, stating the reasons therefor. The judge who imposed the original sentence, or any other qualified judge duly designated to act, may thereupon fix the definite sentence by modifying or affirming the original sentence. If the judge fixes a definite sentence different from that recommended by the Division, he shall state his reasons, which shall be reduced to writing and become a part of the records of the Division. If the Division shall not make its recommendation within the time herein limited, the court shall fix the definite sentence which the offender shall serve. If the Division files its recommendation within the time herein limited and the court does not fix a definite sentence within two months, the sentence recommended by the Division shall become the definite sentence and the clerk shall thereupon enter judgment accordingly. In no event shall the definite sentence be longer than the maximum term prescribed by law. When

an offender has appealed from a judgment of conviction and elects to enter upon the service of his original sentence, the definite sentence may be fixed notwithstanding the pendency of the appeal.

Sec. 2. In determining terms of imprisonment to be recommended by it, the Division shall consider all pertinent information. Before making a report and recommendation, each offender shall be personally interviewed by a member of the Division and under rules prescribed by the Board shall be accorded a hearing before one or more members of the Division as to the length of sentence to be recommended.

This proposal provided in substance that the sentence should be for the maximum term, and that in some cases the definite sentence as recommended by the Division could become effective without further participation of the judge and, obviously, without the reappearance of the defendant. At House hearings on the bill,[15] there was discussion of the constitutionality of the provision whereby the definite sentence might take effect with no further action by the court. Judge Parker said, "The man is constitutionally sentenced to the maximum sentence, and he is not in a position to complain of a reduction in sentence. I think that takes care of the question of constitutionality."[16] In this connection, the Federal Bar Associa-

[15] Hearings were also held before the Senate Subcommittee. See Hearings before a Subcommittee of the Committee on the Judiciary of the United States Senate on S. 895, 78th Cong., 1st Sess.

[16] Hearings before Subcommittee No. 3 of the Committee on the Judiciary of the House of Representatives, 78th Cong., 1st Sess. on H.R. 2140, p. 9.

tion of New York, New Jersey and Connecticut, and the Brooklyn Bar Association recommended that, when an offender's sentence was to be finally passed on by the judge, he be notified of his right to be represented by counsel. There was no proposal that the offender himself be brought back.[17] It was also recognized that it was necessary to impose sentence in advance in order to lay a foundation for a procedure involving commitment to a penal institution.[18]

The bill did not then pass.[19] In the years that intervened between H.R. 2140 (1943) and the passage of 18 U.S.C. 4208(b) (1958), many related bills were submitted to Congress, but no concerted effort was made to secure their passage. However, the youth provisions were separated and passed in 1950 as the Federal Youth Corrections Act, 18 U.S.C. 5005, *et seq.* This legislation contained many of the indeterminate sentence features. See 18 U.S.C. 5010. Also in the intervening years, the Federal Rules of Criminal Procedure were adopted, of which the significant ones for present purposes are Rule 35 providing for the reduction of sentence within 60 days and Rule 43 providing that "The defendant's presence is not required at a reduction of sentence under Rule 35." (See history of Rule 35, *infra*, p. 31). These assumed considerable significance in the immediate legislative history of Section 4208(b).

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[17] *Id.*, p. 53, 55.

[18] *Id.*, p. 65, cf. p. 97.

[19] Opposition was expressed to having the procedure apply to all sentences of more than a year. There was also opposition to having district courts state their reasons in writing when they imposed a sentence which differed from that recommended. Both of these features were eliminated in the present subsection.

2. Legislative History of 18 U.S.C. 4208(b)

On July 29, 1957, the Honorable Emanuel Celler introduced a series of bills on sentencing procedures which were widely circulated to the judiciary and other interested parties, with a request for comments. (Federal Sentencing Procedures, Committee Print, Report to the Committee on the Judiciary, House of Representatives, 85th Cong., 2nd Sess., February 15, 1958. In March 1958, a subcommittee on sentencing of the Judiciary Committee on Administration of Criminal Law submitted a report substantially approving the bills proposed by Congressman Celler and offering an additional provision which was the immediate predecessor of 4208(b).[20] The subcommittee believed that the judges should be provided, if they desired, with a more complete study than was available from a probation officer's report. It observed that "Facilities for such studies are presently in existence, but authority is lacking to the judge to reduce or change a sentence after 2 months, which may not afford ample time to complete such study". Accordingly, the subcommittee recommended an additional section in the following terms:[21]

> Upon the imposition of sentence the court may sentence in accordance with other existing provisions of law, or at its option, may

[20] The report is reprinted in the Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives. 85th Cong., 2nd Sess. on H.J. Res. 425, p. 37–40.

[21] *Id.* p. 39, 70–71.

impose a tentative sentence to imprisonment generally, which shall be deemed to be for the maximum term prescribed by law; in such latter event the defendant shall be committed to the custody of the Attorney General for a complete study of the defendant as described in subsection (b) hereof, except that a report based on this study, together with any recommendations which the Director believes would be helpful in determining the disposition of the case, will be furnished to the court within 3 months unless the court grants time for further study not to exceed an additional 3 months. After receiving such reports and recommendations, the court may in its discretion: (a) reduce the sentence, or (b) place the defendant on probation as provided in section 3651 of this title.

Thus, from the beginning, Section 4208(b) was proposed as a supplement to Rule 35, providing a more generous period of time in which to investigate and consider a possible reduction of the sentence originally imposed. At the hearings before the House subcommittee, Judge Laws of the District of Columbia, who acted as chairman of the Judicial Conference Committee, noted that he had tried this same procedure (*i.e.*, had requested recommendations from prison penologists) within the shorter limits of the 60-day period for reduction of sentence.[22] In its report of June 23, 1958 (H. Rep. 1946, 85th Cong., 2d Sess., to accompany H.J. Res. 424), the Committee

[22] *Id.* p. 29, 35.

recommended the language which now appears, unaltered, in Section 4208(b)."

In the analysis of the legislation, the report stated that this subsection "would make it possible for the court, when confronted with the necessity of making a sentence determination in a particularly difficult case, to commit the defendant (technically under the statutory maximum term) to the Attorney General for a complete study over a period of 3 to 6 months. * * * At the present time, the judge is powerless to modify a sentence later than 60 days after it has begun, which is too brief a time to study and observe the prisoner thoroughly. This provision would extend the court's authority to modify a sentence to a period up to 6 months, thereby making feasible detailed studies of selected defendants before a final sentence must be formulated" (*op. cit.* 9). The report explicitly declared that the prisoner would not have to be present when final action on his sentence was taken, stating (*op. cit.* 10): "There is ample precedent for this provision" and citing Rule 43, F.R. Crim. P. (providing that "The defendant's presence is not required at a reduction of sentence under Rule 35.").

The report on this section concluded (*op. cit.* 10):

> In effect, for those cases in which the court needed further information about the defendant, the bill would extend to a period of 6

[11] No explanation was given for the elimination of the word "tentative" in describing the first sentence, nor for the addition of the phrase providing for "affirming" the sentence of imprisonment originally imposed.

> months the court's present authority of 60 days to reduce a sentence. * * *

The House of Representatives eliminated the provisions for flexible parole eligibility and for committing a prisoner for study prior to final sentence (104 Cong. Rec. 13391–13401) but they were restored by the Senate (104 Cong. Rec. 15353). The Senate report accompanying this bill explained it in much the same terms as the House report, *supra* (Federal Sentencing, Report to accompany H.J. Res. 424, S. Rep. No. 2013, 85th Cong., 2d Sess., p. 4): "In effect this provision extends to a maximum period of 6 months in selected cases the court's power to modify the sentence, now restricted to 60 days under Rule 35 * * *."

The Conference Report, in commenting upon the present subsection, stated:

> The net result of this provision is to extend to a maximum period of 6 months in selected cases the court's power to modify the sentence, now restricted to 60 days under rule 35, Federal Rules of Criminal Procedure * * *.

Federal Sentencing Procedures, Conference Report to accompany H.J. Res. 424; H. Rep. 2579, 85th Cong., 2d Sess., August 13, 1958, p. 2, and 104 Cong. Rec. 17642.

The legislative history is thus explicit that Section 4208(b) was designed to increase the time within which the district judge could reduce the sentence and that Congress intended that the section be administered in the light of Rule 43 which dispenses with the presence of a defendant at the time sentence is

reduced. Strange, indeed, would be an absolute requirement that the offender must always be returned to have his sentence reduced after a scientific study has been made, but that, if no study is made, his sentence can be reduced without his presence. The answer is that Congress never contemplated that a defendant would automatically be returned for modification of sentence under Section 4208(b).

C. THE WEIGHT OF AUTHORITY SUPPORTS THE VIEW THAT RETURN OF THE PRISONER IS A MATTER RESTING IN THE SOUND DISCRETION OF THE DISTRICT COURT

Until the present case and the subsequent decision in *United States* v. *Johnson*, 315 F. 2d 714 (C.A. 2), certiorari pending, No. 123, O.T. 1963, there appeared to be little doubt that the matter of returning the defendant to the courtroom was one of discretion and not of necessity.

Commentators who delved into the background of the legislation inevitably reached this conclusion. See, *e.g.*, Judge Kaufman, *Enlightened Sentences Through Improved Technique*, 26 Federal Probation (September 1962) p. 7; 23 Federal Probation (June 1959), p. 59; 26 F.R.D. 231, 262; 27 F.R.D. 293, 339, 357. The matter was discussed at the Sentencing Institute for the Ninth Circuit, July 8, 1960 (27 F.R.D. 287). The late Judge Goodman explored the various views, noting that the issue involves a "question of due process to some extent." 27 F.R.D. 293, 334 (see *infra*). He indicated that, after consideration, the Northern District of California had adopted the following rule (27 F.R.D. 293, 336–337):

> It was unanimously agreed that the Chief Judge should notify the Director of Prisons that this Court has no policy with respect to the return of defendants sentenced under Section 4208 for final sentence, but that determination as to whether this should be done or not was a matter remaining in the discretion of the Judges of the Court, and dependent upon the circumstances of each case.

He then explained (*op. cit.* 337):

> We devised that rule because we felt that depending upon each case, the persons involved, the nature of the sentence finally imposed, the decision of the Judge in that regard, what might be due process with respect to the presence of the defendant at the time of final sentences might be different, possibly, in different cases.

It was Judge Goodman's view that, in cases of doubt, it would be safer to bring the defendant back, but that he did "not hold to the view that in every case the defendant should be brought back" (op. cit. 345).

The Court of Appeals for the Second Circuit, in *United States* v. *Johnson,* 315 F. 2d 714, 716, cites the opinion expressed at the Highland Park, Illinois, Institute in 1961 in support of its position that presence is required at the modification of sentence. As we read the reports, however, the opinion there expressed is almost the same as that of Judge Goodman above. See 30 F.R.D. 401, 439–440.

The district courts have treated the issue as one addressed to their discretion. *United States* v. *De Blasis,* 177 F. Supp. 484 (D. Md.); *United States* v. *Johnson,* 207 F. Supp. 115 (E.D.N.Y.), reversed on

appeal, *supra*, certiorari pending, No. 123, O.T. 1963; *United States* v. *Rozanc*, 210 F. Supp. 900 (W.D. Pa.). See also *United States* v. *Behrens*, 190 F. Supp. 799 (S.D. Ind.); *United States* v. *DeBlasis*, 206 F. Supp. 38 (D. Md.).[24] So far as we know, no district judge has felt himself bound, in all circumstances, to request the return of a defendant. This is an area, we suggest, in which the views of the district judges are entitled to particular weight, for under our system the responsibility for the sentence rests with them. The district judge has discretion whether to invoke the statute in the first place. He has discretion whether to follow the recommendation of the Bureau of Prisons. He ought also to have discretion to determine whether he would be aided by a recall of the defendant, from whom he has already heard.

II

DUE PROCESS DID NOT REQUIRE THE PERSONAL PRESENCE OF RESPONDENT AT THE TIME HIS SENTENCE WAS REDUCED

A. PRESENCE IS NOT AN ELEMENT OF DUE PROCESS WHERE THE PERSONAL APPEARANCE OF A DEFENDANT WOULD NOT MATERIALLY AID IN DISPOSITION OF THE ISSUES INVOLVED

The majority opinion of the court below and the opinion of the Second Circuit in *United States* v.

[24] *Grabina* v. *United States*, 369 U.S. 426, in which the sentence was vacated and remanded on suggestion of the Solicitor General is inapposite and has frequently been misinterpreted. In *Grabina*, the original sentencing was deferred when Grabina first appeared before the judge. A written sentence was imposed later without Grabina's presence. Hence, neither at the time when sentence was imposed nor when it was modified was Grabina accorded the right to be present.

Johnson, 315 F. 2d 714 (pending on petition for a writ of certiorari, No. 123, this Term), hold that a defendant must be returned to the courtroom if sentence is reduced under Section 4208 because the right of a defendant to be present at the time sentence is imposed is an aspect of due process.[25]

There is, of course, no constitutional provision expressly conferring a right to be present when sentence is reduced, or even when sentence is imposed. Indeed, the Constitution does not specifically mention presence at all. See *Frank* v. *Mangum,* 237 U.S. 309, 346 (dissenting opinion of Justice Holmes). The Sixth Amendment refers only to the right of a defendant "to be confronted with the witnesses against him." To be sure, this has generally been interpreted to require the presence of the defendant during all steps of the criminal trial leading to the adjudication of guilt. But even where the question is one of presence during the course of the trial, the rule has not been inflexibly applied. The courts will consider whether the defendant's presence on the particular occasion could materially affect the outcome. For example, a defendant's presence is not required at the trial when counsel is arguing a question of law, *Johnson* v. *United States,* 318 U.S. 189, 201, or presenting a motion, *Barber* v. *United States,* 142 F. 2d 805, 806–807 (C.A. 4);

[25] For this reason, the merits of the issue are bound up in the question of whether the alleged error is one which can be raised under 28 U.S.C. 2255. If respondent's presence was a fundamental requirement of due process, then it is the kind of issue which could be raised by motion under 28 U.S.C. 2255. And, if defendant's presence is essential, he also would of course be entitled to have counsel present.

United States v. *Lynch,* 132 F. 2d 111, 113 (C.A. 3); *Ormsby* v. *United States,* 273 Fed. 977 (C. A. 6). See, generally, Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases,* 16 Col. L. Rev. 18.

The right to be present at the time of sentence has different origins. This Court has recognized that the sentencing process is discrete from that by which guilt is determined. Both the majority and dissenting opinions in *Snyder* v. *Massachusetts,* 291 U.S. 97, 107, 129, affirm this distinction. And in *William* v. *New York,* 337 U.S. 241, 251, this Court declared that the "due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." The crucial consideration here is that the process of fixing sentence is non-adversary. Once the determination of guilt has been made, the trial judge should exercise his discretion in an atmosphere free from antagonism, with all the aids which modern criminology can supply.

For reasons stemming from procedures which in modern times would be considered lacking in due process—*i.e.,* the prohibition against a defendant's testifying at his criminal trial—the common law recognized the right of a defendant to speak in his own behalf before sentencing in order to offer a plea of pardon or in arrest of judgment. That right of allocution has retained sufficient vitality for other purposes to have persisted in our jurisprudence. *Green* v. *United States,* 365 U.S. 301, 304. And since the right of allocution necessarily involves a right to be present in person, it was almost inevitable that the

right of a defendant to be present at the trial and the right of the defendant to be present at sentencing tended to merge. As a result, considerable confusion arose as to whether a defendant had to be present when a change was made in his original sentence, even though the change was for his benefit and his presence could serve no useful purpose. An example is *Price* v. *Zerbst,* 268 Fed. 72 (N.D. Ga.), where the court held invalid a sentence which, without the prisoner's reappearance, had been changed from three years to two and a half years because the original three-year sentence had been improperly pre-dated by six months.

That such a wooden application of the right to be present was not required under the Constitution was recognized by the drafters of the Rules of Criminal Procedure. As noted earlier, the last sentence of Rule 43, F.R. Crim. P., provides: "The defendant's presence is not required at a reduction of sentence under Rule 35." The advisory notes state:

> The purpose of the last sentence of the rule is to resolve a doubt that at times has arisen as to whether it is necessary to bring the defendant to court from an institution in which he is confined, possibly at a distant point, if the court determines to reduce the sentence previously imposed. It seems in the interest of both the Government and the defendant not to require such presence, because of the delay and expense that are involved.

See, also, Dession, *The New Federal Rules of Criminal Procedure: II,* 56 Yale L. J. 197, 246; *United States* v.

Woykovsky, 297 F. 2d 179 (C.A. 7), certiorari denied, 369 U.S. 867.

Since the adoption of the Rules, there has been no doubt expressed on the proposition that a sentence may be reduced or corrected for the benefit of a prisoner without requiring him to be personally present when the beneficial change is made.[20] The unquestioned validity of the provision in Rule 43 demonstrates that the presence of the defendant is not an essential ingredient of due process in all situations. Cf. *Yates* v. *United States*, 356 U.S. 363, 367, where this Court on review of convictions for contempt determined that the sentence should be reduced to the period already served in confinement.

Thus, the constitutional issue comes down to this: Do the particular procedures which are followed when Section 4208(b) is invoked make it essential, from the standpoint of fundamental fairness, to provide for allocution on two occasions? We believe not.

As we have shown *supra*, and as discussed in our brief in *Corey*, No. 31, O.T. 1963, the statute contemplates that all the usual processes of sentencing will be completed before a study is ordered, *i.e.*—a presentence report; an opportunity for both counsel and defendant to be heard; a sentence which is actually

[20] The English system has likewise moved from inflexibly rigid requirements, *Hales*, 17 Cr. App. Rep. 163, 1 K.B. 602; *Casey*, 23 Cr. App. Rep. 193, so as to permit reductions in sentence without the delay and expense of producing a prisoner. *Jowsey*, 11 Cr. App. Rep. 241; *Thomas*, 28 Cr. App. Rep. 21. Appellate courts have long been allowed by statute to pass sentence in the absence of the appellant. Criminal Appeal Act, 1907 (c. 23), s. 11(2), 5 Halsbury's Statutes of Eng., 2 ed., 926, 933.

incorporated in a judgment and forms the basis for a commitment to a federal penitentiary.

We recognize that, in many situations, the maximum sentence imposed when the study is ordered is not, in the mind of the judge, the sentence which he would ultimately impose, with or without the study. It is this factor which apparently led the court below and the Second Circuit to hold the presence of a defendant necessary when, after study, the sentence is affirmed or modified. This, however, seems to us to introduce unnecessary rigidity into a scheme of sentencing carefully designed to be flexible and responsive to the need of rehabilitating offenders. Aside from consultation as to appeal—which, as we show in *Corey*, should occur at the time the case is concluded—the only reason to require the presence of a defendant at the time of sentencing is to afford him an opportunity to bring to the attention of the trial judge, in his own words, personal factors peculiarly within his knowledge. There is no reason to suppose that the defendant's right of allocution cannot be meaningfully exercised before the trial judge makes the decision to utilize the procedures of Section 4208(b), *i.e.*, before the entry of the judgment of conviction which concludes the criminal case and results in the commitment of the defendant to prison. The considerations which a defendant might offer in favor of leniency—mitigating circumstances, contrition, family conditions, etc.—can all be brought to the attention of the judge at that time. If, at that point, a conscientious judge concludes that he might profit from an expert diagnostic study, that surely does not

compel the conclusion that he would be aided by a reappearance of the defendant whom he has already observed throughout the trial and from whom he has already heard, both in person and through counsel.

Of course, where the results of a study raise questions in a judge's mind or where there are factors which a judge wishes to emphasize to a defendant, he is free to summon him once again. But because this may be desirable in some cases does not mean that it is desirable in all or that it approaches constitutional necessity. A defendant has no right to test out-of-court information of which the judge avails himself in individualizing the sentence, *Williams* v. *New York*, 337 U.S. 241, and having once been granted the full right of allocution, he is not entitled as a matter of right to a second opportunity.[27]

The procedures of Section 4208(b) are optional; they are used only when a judge feels that he will be aided by expert diagnostic guidance; they offer, from the defendant's standpoint, the prospect of substantial amelioration—a prospect beyond "due process." If, in order to avail himself of added guidance, the judge must invariably bring the defendant back for a further hearing and make certain that counsel (often ap-

[27] Section 4208(b) does not provide that the diagnostic study should be made available to a defendant. Similarly, a presentence report prepared under Rule 32(c), F. R. Crim. P., is not exhibited to a defendant, although, of course, the judge may, in his discretion, disclose portions of it or question the defendant about the information contained therein. *Friedman* v. *United States*, 200 F. 2d 690 (C.A. 8), certiorari denied, 345 U.S. 926; *Hoover* v. *United States*, 268 F. 2d 787 (C.A. 10). But cf. *Smith* v. *United States*, 223 F. 2d 750 (C.A. 5).

pointed), will return to the case some three to six months after it has otherwise been concluded, we anticipate considerable reluctance on the part of trial judges to invoke Section 4208(b). This would benefit neither the administration of justice nor defendants generally.

B. IN THIS CASE, THERE WAS NO REASON WHY THE DEFENDANT SHOULD HAVE BEEN PRESENT WHEN HIS SENTENCE WAS REDUCED FROM TWENTY TO FIVE YEARS

This case affords an excellent illustration of our point that due process does not require the personal return of the defendant simply because the procedures of 18 U.S.C. 4208(b) have been utilized. Respondent was given every opportunity to speak in his own behalf before the judge decided to invoke 18 U.S.C. 4208(b). See R. 11–13. He declined to express contrition or to offer anything by way of mitigation—"My remarks ain't fit in your ears" (R. 13). The judge indicated that, in his opinion, respondent merited a long sentence, but that he had found that heavy sentences did not act as a deterrent to the commission of penitentiary offenses. He made it clear that in this matter of internal discipline he would be guided by the views of the prison authorities. Respondent's sentence was in fact reduced from twenty years to five years, with the further provision that the Board of Parole could decide when the respondent should be eligible for parole, thus allowing for still earlier release if he responded to rehabilitative measures. It is difficult to

imagine what more respondent could have gained by his presence.[23]

In sum, there is nothing in the conduct of this case which even remotely suggests that there was a practical necessity for conducting a trial-type hearing. Respondent was present at every stage at which his presence would be meaningful. He was afforded a right to speak in his own behalf after the adjudication of guilt and before the court imposed the sentence which concluded the criminal case. Utilization of the procedures of Section 4208(b) has resulted in a full, fair and informed consideration of the sentence to be imposed and in an ultimate disposition notable for its leniency.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be reversed.

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AUGUST 1963.

[23] Indeed, respondent's motion under 28 U.S.C. 2255 did not raise any claim of prejudice from his absence at the time of sentence. He complained about alleged trial errors and remarks at the time of the *original* sentencing.

U.S. GOVERNMENT PRINTING OFFICE: 1963

IN THE

United States Supreme Court

OCTOBER TERM, 1963

No. 86

UNITED STATES OF AMERICA,
Petitioner,

v.

KENNETH LEROY BEHRENS,
Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at (R. 30-37) 312 F. (2d) 223. An opinion of the District Court in a previous proceeding is reported at 190 F. Supp. 299 (S. D. Ind.).

JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 1962 (R. 38-39). The United States Government filed a Petition for Certiorari on March 7, 1963, and

the same was granted on April 29, 1963 (R. 39, 373 U. S. 902). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED.

Whether the respondent was required to be present when his sentence was finally determined under the provisions of 18 U.S.C. 4208(b).

SUMMARY OF ARGUMENT

This action arose from an order denying respondent relief under 28 U.S.C. §2255. The Court of Appeals for the 7th Circuit reversed the Trial Court upon the grounds that the respondent was not present nor was he represented by counsel at the time his sentence was finally determined under 18 U.S.C. 4208(b). The holding of the Court of Appeals was correct.

A.

A Criminal Defendant Is Entitled To Be Represented by Counsel at Every Stage of the Criminal Proceeding

It is a fundamental concept of American jurisprudence that a criminal Defendant is entitled to be represented by counsel at every stage of the criminal proceeding. This right is guaranteed under the 5th and 6th Amendments of the Constitution. This Court has repeatedly held that a Defendant is entitled to be represented by counsel and failure to provide counsel is a denial of due process. *Johnson v. Zerbst*, 304 U. S. 458 (1938).

The requirement of counsel has been amplified by Rule 44, Federal Rules of Criminal Procedure. Thus, we have each individuals right to counsel secured by the Constitution, Court decisions and Court rules.

B.

A Criminal Defendant Is Entitled To Be Present and Represented by Counsel at the Time Final Sentencing Is Imposed Under Title 18 U.S.C., Section 4208(b)

Under 18 U.S.C., §4208(b), final sentencing of a criminal Defendant is not made until certain reports and recommendations are received by the Trial Judge. At the time this statute is applied the Trial Court is required to impose the maximum sentence under law, then when the studies have been completed the Trial Court is required to fix the final sentence.

In the words of the Trial Judge in the instant case, this is done so "that we should be able to come up with a sane and civil disposition of your case." (R. 16)

The Trial Court recognized that he was not making final disposition of this case when he imposed the mandatory maximum sentence. This Court has held in *Parr v. U.S.*, 351 U. S. 513 (1956), that there was no final determination until there was nothing left to do but execute the sentence.

Rule 43, Federal Rules of Criminal Procedure, requires that a Defendant be present at the time sentence is imposed and Rule 44 gives him the right of counsel.

The right to be present when final sentence is determined is particularly important as this is the only time the Defendant can effectively exercise his right of allocution. It is at this time and only this time that the Trial Judge has any discretion in imposing punishment.

The obvious intent of §4208(b) is ably expressed by the Court of Appeals for the 7th Circuit in its opinion in this case when it held:

"To regard the maximum term of imprisonment 'deemed' to have been imposed by §4208(b) as an actual sentencing of the defendant, even where, as here, the maximum term is expressly written into the judgment order, is, in our considerd judgment, directly contrary to the express intent and purpose of the section. The declared object and purpose of §4208(b) is to enable the Court to obtain such detailed information as may aid it in determining the actual sentence to be imposed. It is for this purpose that §4208(b) authorizes and provides for a limited postponement of definitive action until the study is made and the reports and recommendations received. The action to be taken under §4208(b) is unlike a reduction of sentence made under Rule 35, Federal Rules of Criminal Procedure. Rule 35 admits of a discretionary reduction of a sentence already definitely imposed and Rule 43 properly dispenses with the defendant's presence for such purpose. But, under §4208(b) until the 'affirmance' of the maximum term of imprisonment or its 'reduction' no definitive sentence has been imposed—there is no sentence." (R. 34)

ARGUMENT

A.

A Criminal Defendant Is Entitled To Be Represented by Counsel at Every Stage of the Criminal Proceeding

The question of a Defendant's right to be represented by counsel has been firmly established as a prerequisite to satisfy due process. In *Johnson v. Zerbst*, 304 U. S. 458 (1938), the Supreme Court held that under the Sixth Amendment a defendant must be provided with counsel to assist him in his defense (if he is unable to obtain counsel) and that a trial court's failure to safeguard a defendant's rights in this respect resulted in its loss of jurisdiction to proceed.

Walker v. Johnson, 312 U. S. 275 (1940);

Glasser v. United States, 315 U. S. 60 (1941);

Von Molthe v. Gillies, 332 U. S. 708 (1948);

all affirmed this right under the Sixth Amendment.

See also Rules 43 and 44 of Federal Rules of Criminal Procedure.

The right to be represented by counsel at the time of sentence, is also firmly established as a part of due process. In *Miller v. United States*, 185 F. (2d) 137 (5th Cir. 1950), the Defendant appeared at the time of sentencing with an attorney appointed to represent him on appeal. Then the appellate counsel did not undertake to assist the Defendant at the time of sentencing and the Defendant was required to represent himself. Accordingly the Court of Appeals reversed.

In *Ellis v. Ellison*, 239 F. (2d) 175 (5th Cir. 1956), the Court of Appeals ordered a state court defendant resentenced because his attorneys were not present at the time sentence was imposed.

In *Wilfong v. Johnson*, 156 F. (2d) 507 (9th Cir. 1946), the Court of Appeals ordered petitioner, an Alcatraz prisoner serving a twenty-five (25) year Federal bank robbery sentence, discharged from the sentence because it appeared that while associate trial counsel was in the court room he did not undertake to represent the defendant at the time of sentencing. The court states at pages 509-510:

> "• • • The mere presence in the court room as a spectator of an associate counsel who had helped represent the petitioner at the trial and who considered that his connection with the case had ended with the verdict, does not meet the guaranty of the Sixth Amendment of the Constitution • • •
>
> "We conclude that because of the failure of petitioner to be represented by counsel at the time of pronouncement of judgment and sentence he was deprived of a constitutional right and therefore the judgment and sentence (are) void."

In the instant case the respondent was not represented by counsel nor was he present when the final determination of his sentence was made. He had no opportunity to be advised of any further rights nor was he advised as to the meaning and effect of the final sentencing. Further, he was deprived of the right to present an argument either by himself or by counsel relating to the facts the District Court took into consideration in the final determination of his sentence.

Other leading cases enunciating the principal that a criminal defendant is entitled to be represented by counsel at sentencing are *Thomas v. Hunter*, 153 F. (2d) 834

(10th Cir. 1946) and *Gadsen v. United States*, 223 F. (2d) 627 (1955).

B.

A Criminal Defendant Is Entitled To Be Present in Court and Represented by Counsel at the Time the Final Sentence Is Imposed Under Title 18 U.S.C., Section 4208(b)

It is firmly established by the Fifth and Sixth Amendments to the Constitution of the United States of America under decisions of this Court and by Rules 43 and 44 of the Federal Rules of Criminal Procedure that a defendant has a right to be present and represented by counsel at every stage of the Criminal proceedings, and the sole question presented in this case is whether a reduction of sentence under §4208(b), Title 18 U.S.C., is a stage of the Criminal proceeding.

Section 4208(b), Title 18 U.S.C., is, as follows:

> "If the court desires more detailed information as a basis for determining *the sentence to be imposed*, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants times, not to exceed an additional three months, for further study. *After receiving such reports and recommendations, the court may in its discretion; (1) Place the prisoner on probation as authorized by section 3651 of this title: or (2) affirm the sentence if imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the*

offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section." (Emphasis added.)

This statute creates certain mandatory duties on the trial court. If the trial court desires to avail itself of this statute he must commit the defendant to the custody of the Attorney General for the maximum sentence permitted by law. He has no discretion as to the length of sentence at this stage of the proceedings. In other words, the Court at this stage cannot use its discretion in making the punishment fit the circumstances of the case. Additional mandatory duties are then prescribed.

There must be studies made of the defendant and reports and recommendations submitted by the Director of the Bureau of Prisons within three (3) months, which may be extended to six (6) months, then the trial court must perform certain mandatory functions. When the trial court receives the reports and recommendations, he must either:

1. Affirm the mandatory, original sentence, or
2. Reduce the mandatory, original sentence, or
3. Place the defendant on probation.

This statute, therefore, is clearly unlike the provisions of Rule 35 of the Federal Rules of Criminal Procedure. Rule 35 provides:

"The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

Under Rule 35 the Court has previously thought out the proper sentence to fit the circumstances of the case; used his discretion in fixing the penalty and then upon second thought may reduce it. This rule, unlike §4208(b), has no mandatory requirements for the trial court and a motion under the rule may be summarily denied. This is not true under §4208(b).

There being a fundamental distinction between §4208(b) and Rule 35 of the Federal Rules of Criminal Procedure we turn direct to the question of when the litigation has terminated.

Under the Federal Rules of Criminal Procedure the defendant is required to be present at every stage of the trial including the imposition of sentence. The defendant is also entitled to be represented by counsel at every stage of the proceedings. The Federal Rules of Criminal Procedure, Rules 43 and 44, so provide as follows:

> "Rule 43. Presence of the Defendant. The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

"Rule 44. Assignment of Counsel. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

This court has held that litigation between the Government and a defendant is not terminated until there is nothing left to do but to execute the sentence. In *Parr v. United States*, 351 U. S. 513 (1956), this Court held:

"In general a 'judgment' or 'decision' is final for the purpose of appeal only 'when it terminates the litigation between the parties on the merits of the case, *and leaves nothing to be done but to enforce by execution what has been determined.' St. Louis I. M. & S. R. Co. v. Southern Express Co.*, 108 U. S. 24, 28, 27 L. Ed. 638, 639, 2 S. Ct. 6. This rule applies in criminal as well as civil cases. *Berman v. United States*, 302 U. S. 211, 212, 213, 82 L. Ed. 204, 205, 58 S. Ct. 164."

The trial judge at the time he invoked §4208(b) recognized that the litigation was not terminated between the defendant and the United States and that, in effect, a final judgment was not being rendered, stated:

"Well, it is the Judgment of this Court, based upon the (fol. 17p) Jury's finding of Guilty with regard to Count I of the indictment, that the Defendant is guilty as charged therein; and that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of twenty years, and for a study as described in Title 18, United States Code, Section 4208(c), the results of such study to be furnished this Court within ninety days, or three months—Three months. Make it 'three months' instead of the 'ninety days.' It's more uniform. Within

three months. Whereupon the sentence of imprisonment herein imposed shall be subject to modification in accordance with Title 18, United States Code, Section 4208(b).

"Now in short, Mr. Behrens, what this means is that after there has been a staff evaluation made of your case—and I presume that you're pretty sick about hearing—or sick of hearing about 'staffs' and 'staff evaluations' and 'psychiatric evaluations,' but they have a purpose and they have a place. And we believe in them. Now there will be such an evaluation made in your case.

"And I think after about three months, when everybody (fol. 17q) has had an opportunity to reflect upon your case quite thoroughly, *that we should be able to come up with a sane and civil disposition of your case.*" (Emphasis added.) (R. 15-16)

The Court of Appeals in reversing the trial court also recognized that the litigation was not terminated at the time the trial court imposed the mandatory maximum sentence under §54208(b) when they analyzed *Parr v. United States*, 351 U. S. 513 (1956) in conjunction with Rules 43 and 44 of the Federal Rules of Criminal Procedure. In so analyzing the Court held:

"In *Parr v. United States*, 351 U. S. 513, 518, it was observed that the rule that in general, a judgment is final only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined, applies in criminal as well as civil cases.

"In our opinion that rule is applicable here and fundamental requirements of due process made it essential that the petitioner be present at the time of such imposition of sentence, and that his right to have his counsel present be honored. Rule 43, Federal Rules of Criminal Procedure (18 U.S.C.A.) required the

presence of the defendant. Rule 44 recognizes his right to be represented by his counsel 'at every stage of the proceeding' in harmony with the guarantee of the Sixth Amendment. A sentencing, even to probation, is admittedly invalid in the defendant's absence. *Pollard v. United States*, 352 U. S. 354, 360. The Solicitor General in a memorandum submitted in *Grabina v. United States*, 369 U. S. 426, conceded that absence of a defendant at the time of sentencing was 'fundamental error' and under such circumstances 'there are basic infirmities in the sentence.' Cf. Ellis v. Ellison, 5 Cir., 239 F. 2d 175; Wilfong v. Johnston, 9 Cir., 156 F. 2d 507." (R. 33)

The logic of the holding in *Parr v. United States*, 351 U. S. 513, that the litigation is not terminated until there is nothing to be done but to enforce by execution what has been determined is clear when reviewed practically.

After a criminal defendant has been convicted, if he desires to appeal he must file his notice of appeal within ten (10) days. Under the rule the appeal must be docketed within forty (40) days from the filing of the notice of appeal or a total of fifty (50) days to perfect an appeal. If he was sentenced under §4208(b) the defendant, in effect, has perfected an appeal before he knows what his final sentence will be.

How does counsel advise his client? A defendant may have excellent ground to expect an Appellate Court to reverse a conviction, yet would be willing to forego an appeal and avoid the added expense of an appeal if he received probation. If he is sentenced under §4208(b) and the Government's position is accepted, he would have no alternative but to incur the expense, either on his own behalf or by proceeding in *forma pauperis* immediately. Subsequently action by the trial court may well result in dismissing the appeal after final sentence is determined. It is a well-

known fact that the length of sentence is a major factor and often the most important factor in a defendant deciding to take an appeal. He should not be required to take such action until he knows what the sentence will be.

A second practical reason for the holding that the litigation has not terminated until final sentencing is the defendant's right to allocution under Rule 32(a). The Government has attempted to show that Mr. Behrens refused his right to allocution at the time the mandatory commitment was made. The argument presented, however, misses completely the reasons for the existence of the right to allocution.

Once the trial court has decided to sentence the defendant under §4208(b) he need no longer concern himself with making the punishment fit the crime. Any plea for leniency made by either the defendant or his attorney is meaningless as the trial court at this time is powerless to do anything but to impose the maximum sentence under the law. The importance of the right to allocution is when the arguments of the defendant and his counsel are made to convince the Court to impose a light sentence. To be effective they can only be made when the trial judge can use his discretion to make the punishment fit the circumstances of the case.

In the instant case six (6) months elapsed between the time the mandatory sentence was imposed and the time the trial court finally determined the sentence. The trial court had conducted much business during this time and the defendant would of necessity become another name, another face or another file. Anything Mr. Behrens or any other defendant would have said six (6) months previously would be meaningless at this time. The trial judge cannot possibly have the "feel" of the case by merely reviewing

his trial notes and the reports contained in the file. He must for the first time seriously consider what punishment will fit the circumstances of the case and at this time the respondent was not present. A more important time to exercise the right of allocution cannot be imagined for it is only at this time that everything the respondent said would be meaningful.

CONCLUSION

It is, therefore, respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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IN THE

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AND

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v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE LEGAL AID SOCIETY AS *AMICUS CURIAE*

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BRIEF OF THE LEGAL AID SOCIETY AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties in *United States* v. *Corey* (No. 31) and *Behrens* v. *United States* (No. 86).

The Legal Aid Society is a non-profit organization incorporated under the laws of the State of New York for the purpose of providing legal assistance for those unable to afford an attorney. The Criminal Branch operates in the state courts of the five counties of New York City and the United States District Courts for the Southern and Eastern Districts of New York. In 1962 the Society, by its counsel, was assigned to represent 757 defendants in the Southern District and 264 defendants in the Eastern District of New York. The Society was also assigned to 22 appeals to the United States Court of Appeals for the Second Circuit.

Because the United States, in its brief in *Behrens* (at pp. 26-29) indicates that the disposition here should be dispositive of *United States* v. *Johnson*, 315 F. 2d 714 (2d Cir.) certiorari pending, No. 123, O. T. 1963, wherein the Society represents the respondent Johnson, we submit this brief in an effort to assist the Court in arriving at the most appropriate disposition of these cases.

Statement

Both *Corey* and *Behrens* present one basic question for the Court's determination: When is the sentence imposed in a Section 4208 proceeding? If the action of the trial court upon receipt of the Section 4208 (c) report is *the* sentence then the presence of the defendant is required

under Rule 43, Federal Rules of Criminal Procedure and the defendant's time to take an appeal then begins to run. If the commitment under Section 4208 (b) is *the* sentence then the time to appeal begins to run from that date and the subsequent action on the Section 4208 (c) report is not within the mandatory ambit of Rule 43.

ARGUMENT

The time within which to file a notice of appeal cannot run from the Section 4208 (b) commitment.

This question is squarely posed by *Corey* and the prior proceeding in *Behrens* (190 F. Supp. 799 (S. D. Ind.)).

A. If the Government is correct in its contentions then Congress has either enacted a statute with which it is impossible to comply or has repealed, *sub silencio*, the well settled rule that the filing of a notice of appeal deprives the trial court of jurisdiction to modify sentence while appellate proceedings are pending.

If a notice of appeal is filed within ten days after the commitment then the district court may not modify or reduce sentence within the three months (extendable to six) required by Section 4208 (b) unless the court of appeals has affirmed and this Court denied certiorari.* *United States* v. *Grabina*, 309 F. 2d 783 (2d Cir. 1962) cert. den. 374 U. S. 836 (1963).

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* No valid analogy can be made with the suspended sentence cases where appeal must be taken upon imposition, not after revocation. There the revocation is punishment for post-conviction conduct. Also, if the rule were otherwise, a defendant would be deprived of his right to appeal during the period of his good behavior.

B. Under the Government's position the defendant would have to elect to take his appeal before he would know what sentence he was going to have to serve. Since length of sentence is a major factor—often the most important—in the determination of whether or not an appeal should be taken, the defense may be forced to take an appeal which might otherwise not have been taken had it known what sentence would be imposed. Since the Record on Appeal must be filed in the court of appeals within forty days of the notice of appeal (Rule 39, Fed. R. Cr. P.), the defendant, or the Government in a *forma pauperis* case, will have had to pay for the transcription of the trial minutes in a case where the appeal may not be prosecuted in the event a light sentence is imposed.

C. A legal sentence imposed by a trial judge is generally unreviewable by the courts of appeals. However in some situations the exercise of the trial judge's discretion has been reviewed. See, *e.g.*, *United States* v. *Wiley*, 278 F. 2d 500 (7th Cir. 1960). If the Government is correct then a court of appeals will be unable to review the sentence on those rare occasions where review is desirable and permissible.

Under the Government's theory, perhaps review of the sentence can be had on a separate appeal after the trial court acts on the 4208 (c) report. This would result in two separate appeals and pose an almost insurmountable problem of communication if the represented or unrepresented prisoner is expected to file his notice of appeal within ten days from the final district court action. It would also involve a reassessment of the rule that no appeal lies from an order reducing sentence.

D. Assuming the appeal from a conviction to be perfected prior to the final action by the district court, then the court of appeals will have to decide the appeal without the benefit of knowing the term of imprisonment which the appellant must serve.

In a case where a defendant has been convicted on several counts, appellate courts will not generally review claims of error as to one count if a concurrent sentence is imposed on an unchallenged count. Yet, under *Corey*, the court of appeals would have to decide the appeal without knowing whether consecutive or concurrent sentences would be imposed and presumably would have to consider the merits of claims which it would not consider had the district court imposed concurrent sentences.

The defendant should be present at the time the trial court acts upon the Section 4208 (c) report.

Under Rule 43, Federal Rules of Criminal Procedure, a defendant must be present at the time of sentence and also must be afforded the right of allocution (Rule 32 (a), Federal Rules of Criminal Procedure). Presence at sentence is regarded as such a highly favored right that Rule 43 does not provide for its waiver in felony cases although specific provision is made for the voluntary waiver of the right to be present at other stages of the proceeding.

A. The action by the district court in committing a defendant to the custody of the Attorney General for study and report is "deemed to be for the maximum sentence . . ." Yet what happens if no report is made within the three or six month term and no further action is taken

by the district court? May the Attorney General hold the prisoner for the "deemed" maximum sentence? Clearly not, for the "commitment" expires of its own weight if no further action is taken by the trial court. Such an incomplete proceeding certainly does not add up to the "sentence" necessary to complete the court's judgment.

If it is necessary to take refuge in legislative history to determine the meaning and effect of the disputed portions of the statute it becomes even more apparent that the "deemed to be" provision was intended to meet certain real or imagined constitutional objections to what in substance is an administrative commitment by a judicial officer.

The references to the Committee testimony of the late Judge Parker (Govt's Brief in *Behrens*, No. 86, pp. 20-21) clearly demonstrates concern regarding whether an unsentenced defendant may be held in a federal penitentiary and whether problems might be presented by "increase" in the duration of confinement. It was to meet this concern that the "deemed to be" language was enacted.

B. Further support of legislative intent to enact the procedures demanded by the courts of appeals in *Behrens* and *Johnson* is found in the last sentence of Section 4208 (h) which provides: "The term of the sentence shall run from the date of original commitment under this section."

This provision would be completely unnecessary if *the* sentence was the initial commitment under Section 4208 (b). Only if the action on the report would be *the* sentence would the *nunc pro tunc* provision have any meaning. That the draftsmen found it necessary to spell out that the defendant was to receive credit is clear indication that the initial commitment was not intended to be the sentence.

C. Perhaps the major objection to the construction urged by the Government is that it just does not meet the realities of the situation.

The Government urges (at p. 33 of its brief in *Behrens*) that a defendant may make a full allocution at the time of the initial commitment and that it is unnecessary to recall him again to repeat his plea for leniency. This misses the point of the allocution. Allocution is not just the saying of some words by the defendant. It also involves the consideration of those words by the sentencing judge reasonably contemporaneous with the imposition of sentence. If the defendant is given the opportunity to speak only at the time of the initial commitment, his avowal of penitence or plea for leniency will be meaningless for a Section 4208 commitment requires none of the soul searching and reflection by the trial judge that is required by the imposition of a final sentence. Some three or six months later the court will have, for the first time, to seriously consider how long the defendant is to remain imprisoned. By that time the defendant is probably no more than a name on a piece of paper and the sentencing judge can hardly obtain the "feel" of the case by a review of his notes, the record and the various reports. If the right of allocution is to be effective, then the defendant should be present and allowed to speak at the only time anything he says would be meaningful.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals for the Seventh Circuit should be affirmed and the judgment of the Court of Appeals for the First Circuit reversed.

Respectfully submitted,

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